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1999 G No. CW950014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CREWE DISTRICT REGISTRY

(Given at Leeds Combined Court)
5th May 2000

B e f o r e :
MR JUSTICE CAZALET
BETWEEN :

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CHRISTOPHER GREATOREX	**Claimant**
-and-	
JOHN SIMON GREATOREX	**First Defendant**
MOTOR INSURERS' BUREAU	**Second Defendant/Part 20 Claimant ("the MIB")**
-and-	
HAYDON POPE	**Part 20 Defendant**

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Mr Nicholas Mason (instructed by Poole Alcock & Co, Nantwich) for the Claimant.
Mr Graham Eklund (instructed by Keogh Ritson, Bolton) for the Second Defendant (MIB)
The First Defendant and the Part 20 Defendant were not represented and did not appear.

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HTML VERSION OF JUDGMENT

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Cazalet J:

1. The application before the court raises a preliminary issue. The court is required to determine three questions of law on the basis of a statement of facts agreed between the parties. In essence, the issue is whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury. I go first to the agreed facts.

The Agreed Facts

2. On 11 April 1996 the First Defendant had been drinking with a friend, who is the Part 20 Defendant in the proceedings. The First Defendant was driving a car belonging to the Part 20 Defendant, who had given him permission to drive the car and was a passenger in it. Whilst overtaking on a blind brow the First Defendant negligently drove over on to the wrong side of the road and was hit by an oncoming vehicle. The Part 20 Defendant was uninjured. The First Defendant's head was injured and he was unconscious for about an hour. Initially he was trapped inside the car. The police, ambulance and fire services attended the scene of the accident.

3. Among the fire officers who attended the scene was the Claimant. He is the First Defendant's father. At the time of the accident he was employed as a Leading Fire Officer. He was nowhere near the scene of the accident when it happened. He went there in the course of his employment. Having been informed that his son had been injured, he attended to him. The Claimant was later diagnosed as suffering from long-term severe post-traumatic stress disorder as a result of the accident.

4. The First Defendant was subsequently convicted of driving a motor vehicle without due care and attention, driving without insurance, and failing to provide a specimen.

The Proceedings

5. The Claimant has brought proceedings claiming damages against the First Defendant, his son. Since the First Defendant was uninsured at the time of the accident, the Motor Insurers' Bureau has been joined as the Second Defendant. The Second Defendant has in turn brought Part 20 proceedings against the Part 20 Defendant seeking an indemnity from him on the basis that he allowed the First Defendant to drive his car without insurance against third party risks in breach of the Road Traffic Act 1988.

The Preliminary Questions of Law

6. On the basis of these facts and the pleadings it was directed by the court, with the agreement of the parties, that the court should determine three preliminary questions of law. The three preliminary questions are as follows:

"1. Does a primary victim (i.e., the First Defendant) owe a duty of care to a third party in circumstances where his self-inflicted injuries cause that third party psychiatric injury?

2. On the agreed facts, did the First Defendant owe the Claimant a duty of care not to harm himself?

3. On the agreed facts, did the first Defendant owe the Claimant a duty of care not to cause him psychiatric injury as a result of exposing him to the sight of the First Defendant's self-inflicted injuries?"

7. At the hearing of these preliminary issues only the Claimant and the Second Defendant appeared and were represented.

The Role of Policy Considerations

8. It is not in dispute that the onus is on the Claimant to show that a duty of care exists, either on the basis of existing authority or by the application of established principle. It is well settled that whilst foreseeability is a necessary condition of the existence of such a duty it is not of itself a sufficient condition. It must in addition be fair, just and reasonable for a duty of care to be imposed in a particular situation. The law was encapsulated by Lord Bridge of Harwich in*Caparo Industries PLC v. Dickman* [1990] 2 AC 605 at p.617H in the following well known passage:

"[I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other… [T]he concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to duty of care of a given scope."

9. These observations apply with particular force in the field of negligently inflicted psychiatric injury, where policy considerations loom large. This is evident from each of the quartet of decisions in which the House of Lords has reviewed this area of the law in the last two decades, starting with *McLoughlin v O'Brian* [1983] 1 AC 410, in which at 420H Lord Wilberforce observed:

"Foreseeability… is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or class, the statement that there is a 'duty of care' denotes a conclusion into the forming of which considerations of policy have entered".

10. He then proceeded to set out the policy arguments which led him to conclude that there should be no wide extension of the then established limitations on recovery of damages for this type of injury.

11. In the next House of Lords decision, *Alcock v. Chief Constable of South Yorkshire Police*[1992] 1 AC 310 (the first of two House of Lords decisions arising out of the Hillsborough football stadium disaster) Lord Oliver of Aylmerton at 411E put the matter as follows:

"[I]n the end, it has to be accepted that the concept of 'proximity' is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analytical deduction".

12. He too concluded that the restrictions on the existence and scope of the duty of care in this area were founded upon policy considerations rather than upon any logical requirements.

13. Again, in *Page v Smith* [1996] 1 AC 155 at 197F Lord Lloyd of Berwick explained that in nervous shock cases involving claims by those not directly involved in the accident the law insists on certain control mechanisms "in order as a matter of policy to limit the number of potential claimants".

14. Finally, in *White v Chief Constable of South Yorkshire Police* [1999] 2AC 455 (the second of the Hillsborough disaster cases) at 493A Lord Steyn stated:

"Policy considerations have undoubtedly played a role in shaping the law governing recovery for pure psychiatric harm".

15. He then went on to identify a number of distinctive features of claims for psychiatric harm which he suggested might in combination account for the differential treatment by our law of physical injury and psychiatric harm.

The Control Mechanisms

16. The control mechanisms which restrict the scope of the duty of care where damages for psychiatric injury arising out of an accident are claimed by claimants who were not directly threatened by the accident but learned of it through seeing it or hearing of it were defined in*Alcock* (*supra*). Lord Hoffmann in *White* (supra) at 502 G-H conveniently stated them in summary form:

"(1) The plaintiff must have close ties of love and affection with the victim. Such ties may be presumed in some cases (e.g. spouses, parent and child) but must otherwise be established by evidence.

(2) The plaintiff must have been present at the accident or its immediate aftermath.

(3) The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else."

Primary and Secondary Victims

17. In *Page v Smith* (*supra*) Lord Lloyd, with whose speech Lord Ackner and Lord Browne-Wilkinson agreed, placed emphasis upon the distinction in nervous shock cases between the position of a primary victim of an accident, who is directly involved as a participant and is within the range of foreseeable physical injury, and that of a secondary victim, whose psychiatric injury is caused by witnessing or participating in the aftermath of an accident which causes or threatens death or injury to others. Among the principal consequences of this distinction are that the primary victim, unlike the secondary victim, can recover damages for his psychiatric injury even if such injury was unforeseeable, and that he can do so even if he suffered the psychiatric harm because he lacked normal fortitude or 'ordinary phlegm': see ibid. at 185F-188F.

18. I turn to the competing arguments which have been urged upon me as to whether a duty of care situation arose on the facts of this case.

The Claimant as Rescuer

19. Mr Mason for the Claimant first submits that the First Defendant owed the Claimant a duty of care in his capacity as a rescuer, separate and apart from, for the purpose of this submission, the fact that he was also a close relative of the First Defendant.

20. It seems reasonably clear that prior to the decision of the House of Lords in *White (supra)*rescuers were treated as coming within a special category. Lord Oliver in *Alcock* (*supra)* at 408B summarised the position of the rescuer as it was then seen to be as follows:

"Into the same category, as it seems to me, fall the so-called 'rescue cases'. It is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing. The fact that the injury suffered is psychiatric and is caused by the impact on the mind of becoming involved in personal danger or in scenes of horror and destruction makes no difference. 'Danger invites rescue. The cry of

distress is the summons to relief ….. the act, whether impulsive or deliberate, is the child of the occasion':*Wagner v. International Railway Company* (1921) 232 N.Y. 176, 180-181, per Cardozo J."

21. It is interesting to note that counsel for the defendant in that case, the Chief Constable, conceded that rescuers were in a special category (*ibid.* at 391C).

22. However, in *White (supra)* the House of Lords concluded by a majority of three to two that for policy reasons rescuers should no longer be regarded as coming within a special category. Lord Steyn and Lord Hoffmann, with both of whose speeches Lord Browne-Wilkinson agreed, concurred in dismissing claims by police officers who had suffered psychiatric injury as a result of their experiences at the Hillsborough disaster. The effect of the majority decision is that in order to recover compensation for pure psychiatric injury suffered as a rescuer the claimant has at least to satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so, although it is not necessary for him to establish that his psychiatric condition was caused by the perception of personal danger. Where this element of personal danger is lacking his position is no different from that of other secondary victims who are subject to the control mechanisms to which I have referred above: see *White (supra)* at 497A, 499F-H, per Lord Steyn*;* at 509D-511G, *per* Lord Hoffmann.

23. The speeches of Lord Steyn and Lord Hoffmann are to be compared with the no less powerful dissenting speeches of Lord Griffiths and Lord Goff of Chieveley, both of whom were of the opinion that rescuers should remain in the special category in which they had previously appeared to be placed. Both Lord Griffiths and Lord Goff accepted, however, that it should only be in exceptional cases that rescuers who were not in any physical danger should be permitted to recover for their psychiatric injury. At 465A Lord Griffiths said:

"If the rescuer is in no physical danger it will only be in exceptional cases that personal injury in the form of psychiatric injury will be foreseeable for the law must take us to be sufficiently robust to help at accidents that are a daily occurrence without suffering a psychiatric breakdown. But where the accident is of a particular horrifying kind and the rescuer is involved with the victims in the immediate aftermath it may be reasonably foreseeable that the rescuer will suffer psychiatric injury...."

24. At 484F Lord Goff, having described the circumstances in which the rescuer found himself in*Chadwick v British Transport Commission* [1967] 1 WLR 912 (the Lewisham train disaster case) as "wholly exceptional", stated:

"It must be very rare that a person bringing aid and comfort to a victim or victims will be held to have suffered foreseeable psychiatric injury as a result".

25. Both Lord Griffiths and Lord Goff regarded the circumstances of the Hillsborough disaster as falling within that exceptional category.

26. Mr Mason urges me not to follow the majority opinion in the House of Lords on the ground that it constituted an unwarranted departure from previous authority, which, he submitted, had firmly established the rescuer claiming damages for psychiatric injury as being within a special category. He submits that the minority views of Lord Griffiths and Lord Goff should be followed. He argues that in the case of a particularly horrific accident in which the rescuer finds himself in exceptional circumstances justice may cry out for compensation for the psychiatric harm he suffers in consequence, even if he is not exposed to any physical danger and does not reasonably apprehend such danger.

27. It seems to me that this submission is nothing less than an attempt to reopen the argument which was rejected by the majority opinion in *White*. The majority decision in that case has made it clear that the rescuer seeking to recover damages for purely psychiatric injury is to be regarded as a secondary victim having no special status. It is clearly not open to me to decline to follow that decision. The consequence is that on the agreed facts of the present case, it being accepted on all sides that the Claimant was never in any physical danger nor in fear of such danger, his claim *qua* rescuer must fail.

28. I would add, for the sake of completeness, that even had I been persuaded by Mr Mason to discard our doctrine of precedent and follow the minority views of Lord Griffiths and Lord Goff in*White*, my conclusion on the agreed facts would not have been any different. Although the accident involved a potentially serious

injury to the First Defendant, the circumstances in which the rescuers involved in the aftermath of that accident found themselves in no way approached the horror of the circumstances in which the rescuers found themselves in the Lewisham train disaster or in the Hillsborough football stadium disaster. Even on the minority view in *White*, a rescuer who suffered psychiatric injury in consequence of his experiences after arriving at the scene of this accident would not on the facts of this case be entitled, as a rescuer, to recover damages for his injury.

29. Accordingly the Claimant cannot succeed in this case on the sole ground that he was a rescuer.

The Claimant as Father

30. Mr Mason next submits that the Claimant, as the First Defendant's father, meets the requirements of each of the control mechanisms applicable to claims by secondary victims, to which I have referred above. Mr Eklund, for the Second Defendant, the Motor Insurers' Bureau, concedes that on the agreed facts both the first requirement, that there must be close ties of love and affection between the primary and the secondary victim, and the third requirement, that the psychiatric injury must have been caused by direct perception as opposed to hearing about the accident from someone else, appear to be satisfied. He contends, however, that the Claimant does not satisfy the second requirement, that he must have been present at the accident or its immediate aftermath.

31. In *McLoughlin v. O'Brian* (*supra*) the claimant was held by the House of Lords to have been present at the immediate aftermath of the accident when she attended hospital to see her injured family somewhat over an hour after the accident. In contrast, in *Alcock (supra)* Lord Ackner at 405A and Lord Jauncey of Tullichettle at 424 A-B were both of the opinion that a visit to the mortuary some eight or nine hours after the disaster could not qualify as being within its immediate aftermath. In the present case the Claimant was at the scene of the accident very shortly after its occurrence, at a time when the First Defendant was still trapped in the wreckage and in urgent need of help from the emergency services. The facts of the present case are much stronger than the facts of *McLoughlin v. O'Brian*, both as regards timing and as regards location. I therefore reject Mr Eklund's submission.

32. I find that the Claimant meets the requirements of each of the control mechanisms which govern a claim for psychiatric injury suffered by a secondary victim of an accident.

The Claimant as Rescuer and Father

33. Mr Mason maintains that the dual status of the Claimant as a rescuer and a close relation gives rise on the facts to a unique situation not contemplated by the authorities which would justify the court in treating him as a primary victim of the accident. He argues that the First Defendant's negligent driving made it reasonably foreseeable that (1) there might be a serious accident, (2) it might cause death or serious injuries, (3) the attendance of the emergency services might be required, and (4) since the location of the accident was close to the Claimant's place of employment, he might come to the scene in his role as a fireman trained to deal with road traffic accidents. By this chain of reasoning, he submits that the Claimant's rescue of the First Defendant was reasonably foreseeable.

34. As I have already observed, foreseeability of injury is not of itself sufficient to create a duty of care in this area of the law. Even were I to accept Mr Mason's foreseeability point, it seems to me that his assertion that a special status attaches to the Claimant is quite irreconcilable with the majority decision in *White* (*supra*). In the absence of danger to or the reasonable apprehension of danger by the rescuer he will only qualify for compensation for psychiatric injury if he meets the requirements of the control mechanisms, one of which is that there must be a close tie of love and affection between the rescuer and the primary victim of the accident. In such a case, it is the fact that the rescuer is a close relative and not the fact that he is a rescuer which brings him within the category of claimants prima facie entitled to claim damages.

35. I would add that since the control mechanisms require both close proximity to the accident in terms of time and space and a close relationship between the claimant and the victim of the accident, rescue attempts by claimants who satisfy the requirements of the control mechanisms are something which may well be expected in certain cases. On analysis, what is said to be the unique feature of the present case is

the fact that the Claimant happens to be a professional rescuer. That feature of the case adds nothing to the strength of his claim. Lord Hoffmann's observation in *White* (*supra)* at 510H seems in point:

"I have no doubt that most people would regard it as wrong to award compensation for psychiatric injury to the professionals and deny compensation for similar injury to the relatives".

36. There may be occasions when police officers, ambulance drivers, doctors, nurses and other hospital workers will find themselves professionally concerned in an emergency situation involving an injured close relative. I do not see why the fact that in such cases they will have the dual status of rescuer and close relative makes them any better placed to recover damages for psychiatric illness than they would be on the basis of either status considered individually.

37. Following the conclusion of argument in this case the report of the decision of the House of Lords in *W v Essex CC* [2000] 2 All ER 237 has been published. In that case parents claimed damages from a local authority for psychiatric injury said to have been caused to them as a result of their having learned that a foster child whom the local authority had placed in their care had sexually abused their own children. Not only was the factual context of that case totally different from that of the present case, but so too was the legal context in which the matter arose for consideration in the House of Lords. That case concerned a strike out application, to which of course different principles apply from those applicable where the court must decide a preliminary question of law. In *W v Essex CC (supra)* at 243F Lord Slynn of Hadley said:

"Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as 'primary' or 'secondary' victims? As to being primary victims it is beyond doubt that they were not physically injured by the abuse and on the present allegations it does not seem reasonably foreseeable that there was risk of sexual abuse of the parents. But the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations".

38. Those observations, made in the contexts to which I have referred, do not lead me to revise the conclusion which I have reached above, that the Claimant's dual status as rescuer and father adds nothing, in terms of proximity, to his status as the First Defendant's father.

The First Defendant's Conviction

39. There is a further point which Mr Mason urges upon me. He draws my attention to the First Defendant's conviction for driving without due care and attention on the occasion when he caused the accident. He argues that a person driving on the public highway owes a general duty to others who may be affected by his driving. He goes on to submit that the fact that the First Defendant's self-inflicted injuries flowed from conduct for which he was criminally liable brings the case into a special category. I disagree. It seems to me that the essential question is whether, in the particular circumstances, a civil law duty of care was owed. Acts causing self-inflicted injuries may be deliberate or negligent, but there seems to be no reason in principle why the fact that such an act gave rise to criminal liability should cause it to be treated differently, in relation to the issue which I have to consider, from other deliberate or negligent acts which do not give rise to criminal consequences.

Duty Owed by Victim of Self-Inflicted Injuries: The Authorities

40. There is no reported English decision on the question whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury. Lord Ackner referred to the issue in *Alcock* (*supra*) at 401D:

"As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable. On the basis that there must be a limit at some reasonable point to the extent of the duty of care owed to third parties which rests upon everybody in all his actions, Lord Robertson, the Lord Ordinary, in his judgment in the *Bourhill* case, 1941 SC 395, 399, did not view with favour the suggestion that the negligent window cleaner who loses his grip and falls from a height, impaling himself on

spiked railings, would be liable for the shock-induced psychiatric illness occasioned to a pregnant women looking out of the window of a house situated on the opposite side of the street."

41. At 418C-H Lord Oliver also considered the question. He said as follows:

"Whilst not dissenting from the case-by-case approach advocated by Lord Bridge in*McLoughlin*'s case, the ultimate boundaries within which claims for damages in such cases can be entertained must I think depend in the end upon considerations of policy. For example, in his illuminating judgment in *Jaensch v. Coffey* (1984) 155 CLR 549, Deane J expressed the view that no claim could be entertained as a matter of law in a case where the primary victim is the negligent defendant himself and the shock to the plaintiff arises from witnessing the victim's self-inflicted injury. The question does not, fortunately, fall to be determined in the instant case, but I suspect that an English court would be likely to take a similar view. But if that be so, the limitation must be based upon policy rather than upon logic for the suffering and shock of a wife or mother at witnessing the death of her husband or son is just as immediate, just as great and just as foreseeable whether the accident be due to the victim's own or to another's negligence and if the claim is based, as it must be, on the combination of proximity and foreseeability, there is certainly no logical reason why a remedy should be denied in such a case. Indeed, Mr Hytner QC, for the plaintiffs, has boldly claimed that it should not be. Take, for instance, the case of a mother who suffers shock and psychiatric injury through witnessing the death of her son when he negligently walks in front of an oncoming motor car. If liability is to be denied in such a case such a denial can only be because the policy of the law forbids such a claim, for it is difficult to visualise a greater proximity or a greater degree of foreseeability. Moreover, I can visualise great difficulty arising, if this be the law, where the accident, though not solely caused by the primary victim has been materially contributed to by his negligence. If, for instance, the primary victim is himself 75% responsible for the accident, it would be a curious and wholly unfair situation if the plaintiff were entitled to recover damages for his or her traumatic injury from the person responsible only in a minor degree whilst he in turn remained unable to recover any contribution from the person primarily responsible since the latter's negligence vis-à-vis the plaintiff would not even have been tortious."

42. *Jaensch v. Coffey* (*supra*), referred to by Lord Oliver, was a decision of the High Court of Australia. It has been considered in other decisions in that jurisdiction. It is right that I should take into account further Commonwealth authorities bearing upon the issue which I have to decide. I can do no better than refer to the words of Lord Goff in *White* (*supra*) at 471H:

"In this, as in other areas of tortious liability in which the law is in a state of development, the courts should proceeds cautiously from one category of case to another. We should be wise to heed the words of Windeyer J spoken nearly 30 years ago in *Mount Isa Mines Ltd v Pusey*(1970) 125 CLR 383 at 396:

'The field is one in which the common law is still in course of development. Courts must therefore act in company and not alone. Analogies in other courts, and persuasive precedents as well as authoritative pronouncements, must be regarded.'"

43. In *Jaensch v. Coffey* (*supra*) a motor cyclist suffered severe injuries in a collision with a vehicle which was driven negligently. The motor cyclist's wife, who was not at the scene of the accident but who saw him in hospital and was told that he was "pretty bad", suffered nervous shock as a result of what she had seen and been told. The wife succeeded in her claim for damages on the basis of her relationship with her husband and the fact that the events which had caused the nervous shock to her were part of the aftermath of the accident resulting from the Defendant's negligence.

44. At 604 Deane J, in referring to the duty of care to avoid psychiatric injury unassociated with physical injury, said:

"It will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than a person whose carelessness is alleged to have caused the injury."

45. Dawson J appears to have inclined towards the same view. At 612 he said:

"On the other hand, there appear to be restrictions of liability to the infliction of nervous shock which are not readily explicable in terms of foreseeability and which may be seen as a result of application of policy considerations.

For example, if no action will lie in negligence against a defendant who carelessly injures himself and thereby inflicts nervous shock upon the plaintiff, there would seem to be a limit imposed which is outside the test of foreseeability."

46. These observations were not necessary for the decision in the case and thus were plainly obiter.

47. Mr Eklund has referred me to a number of other Australian authorities in which the issue in question has received consideration. In *Harrison v. State Government Insurance Office (Qld) and Another* (1985) Aust. Tort Reports 80-723, a decision of the Supreme Court of Queensland, the claimant was a passenger in a car driven by her husband which was involved in a collision through his negligence. Her husband was seriously injured and later died from his injuries. The claimant suffered minor physical injuries but suffered psychiatric illness as a result of the trauma of the accident and of concern for her husband's injuries.

48. Vasta J held that the claimant's psychiatric illness was reasonably foreseeable but that this was not the sole test for determining liability for negligence. He distinguished between the claimant's claim for damages for nervous shock which came from the major emotional trauma which she had experienced as a primary victim of the collision on the one hand, and that which flowed from her concern for her husband and her realisation that he had sustained shocking injuries on the other. Following Deane J's observations in *Jaensch v. Coffey* (*supra*), he held that the claim in respect of the latter, if launched separately, would have been doomed to failure. I note in passing that it was not considered possible to separate the nervous shock suffered by the claimant as a result of her concern for her husband from the emotional trauma arising from the accident itself, but in my view that fact does not detract from the force of Vasta J's observations.

49. In the course of his judgment Vasta J referred to obiter dicta in two earlier Australian authorities which, he suggested, bore out Deane J's statement of principle in *Jaensch v. Coffey* (*supra*). Since the reports of those cases have not been made available to me, I shall draw upon Vasta J's references to them.

50. As to the first of these two authorities, *Dwyer v. Dwyer* (1969) 90 WN (Pt 2) (NSW) 86, Vasta J recorded that Wallace P, giving the judgment of the Court of Appeal of New South Wales, in effect stated at p. 88 that a wife owes no duty to her husband not to injure herself.

51. In the second case, *Kohn v. State Government Insurance Commission* (1976) 5 SASR 225, Vasta J cited Bray CJ as having observed at p. 256:

"… A man or his representatives can hardly be legally responsible for the injurious effect of his own death."

52. Mr Eklund also referred me to the judgment of Zeeman J in *Klug v. Motor Accidents Insurance Board* [1991] Aust. Tort Reports para. 81-134 (Supreme Court of Tasmania). In that case the claimant was a passenger in a car which was being driven by his wife and which was involved in a collision as a result of her negligence. The wife was killed. The claimant claimed damages for psychiatric injury arising not from the accident itself but from the death of his wife. Zeeman J dismissed the claim, saying at p. 69, 274:

"As a matter of principle it might be thought that the plaintiff ought not to be denied damages for his psychiatric injury merely because of the fact that it is the product of the death of the tortfeasor. A possible basis for denying relief is that there existed no duty of care on the part of the tortfeasor not to injure herself and that the damages are the product of such injury (cf.*Dwyer v. Dwyer* (1969) 90 WN (Pt. 2) (NSW) 86 at 88). I do not find that persuasive. There appears to be no reported case where a plaintiff was permitted to recover or denied damages for psychiatric injuries solely resulting from the death of or injury to the tortfeasor. Certainly I was not referred to any such case. Uninstructed by authority I would have thought such a claim to be maintainable if otherwise it satisfied the legal pre-requisites for liability to exist. However I must accept that this area of the law is governed by policy considerations which limit the availability of a remedy. The dictum of Deane J in *Jaensch v. Coffey* (*supra*) to which I have referred, whilst acknowledging that the common law in Australia may change to recognise liability in a case such as the present, ought to be followed by me, sitting at first instance. It requires the plaintiff 's claim for damages for his psychiatric injury to be denied upon the basis that it falls into a category which is not compensatable by reason of policy considerations."

This passage is part of the ratio decidendi of the judgment.

53. Mr Eklund further pointed out that the same conclusion was reached in an unreported decision of the Supreme Court of British Columbia, *Cady v. Anderson* (25 November 1992 – File No. 1493; 17765; summarised in 37 ACWS 3d 46). In that case the Plaintiff was prevented from recovering for psychiatric injury caused by witnessing the death of her fiancé in a car accident caused by his negligence. One of the two grounds given for this decision was the fact that the fiancé was the tortfeasor.

54. The weight of the Commonwealth authorities to which I have been referred clearly tends to support Mr Eklund's submission that there is no duty of care in the situation presently under consideration.

55. Whilst acknowledging that the authorities to which I have made reference were not helpful to his case, Mr Mason submitted that the decision of the Scottish Outer House in *A v B's Trustees* [1906] 13 SLT 830, a decision much closer to home than the Commonwealth cases, provided authority for the sustainability of the Claimant's claim for nervous shock, notwithstanding that the First Defendant's injuries were self-inflicted. The action was brought at the instance of a lady and her daughter, landladies of a furnished apartment in Glasgow, against the trustees and executors of a man to whom the apartment had been let, seeking damages in respect of nervous shock suffered by them as a result of his having committed suicide in the bathroom of that apartment. The action succeeded. Mr Mason submitted that the ratio decidendi of the decision was that a tortfeasor is liable for psychiatric illness caused by his self-inflicted injuries. On analysis of the judgment of the Lord Ordinary, I do not consider the case to have been decided on that basis. The following passage from the judgment of Lord Johnston, at 83, shows that he based liability on contract:

"Is it one of the purposes of renting lodgings that they should be taken for the purpose of committing suicide? I think that it is not, and that in so using the lodgings and turning the bathroom into a slaughter-house, this man was performing a wrongful act, an act in breach of the contract under which he received possession of the premises."

56. In *Bourhill v Young* [1943] AC 92 Lord Porter stated at 120 that the decision in *A v B 'sTrustees* (*supra*) may be explained as:

"… founded on contract or on the fact that the material damage might have been anticipated."

57. Leaving aside any question of breach of contract, in my view such a claim, if made in tort, would now fail for want of the close ties of love and affection.

58. Accordingly I do not consider that the decision in *A v B 's Trustees* (*supra*) is of assistance to the Claimant's case.

59. Mr Mason went on to submit that Deane J's approach in *Jaensch v. Coffey* (*supra*), that as a matter of law no claim can be entertained where the primary victim is the negligent defendant himself and the shock to the claimant arises from witnessing the victim's self-inflicted injury, is not only unworkable but also unjust in that, for example, it would preclude claims such as those of train drivers who suffer nervous shock when a person throws himself in front of their train in order to commit suicide. Although I shall be referring to potentially relevant policy considerations later in this judgment, it seems convenient to deal with this submission at this stage, because Mr Mason relies upon authority in support of it.

60. The authority relied upon is an obiter dictum in the judgment of Watkins LJ in *R v. Criminal Injuries Commission Board ex parte Webb* [1986] QB 184 at 196, where he said, referring to this type of case, that the person attempting to commit suicide "may well be in breach of a duty of care owed to the driver and the passengers." He expressed no final conclusion on the point.

61. It is clear, however, that the case of the train driver falls into a particular category of cases, including *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep. 271, in which a duty of care has been held to exist, and which was described by Lord Oliver in *Alcock* (*supra*) at. 408F in these terms:

"where the negligent act of the defendant has put the plaintiff in the position of being, or thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact."

62. Whether this category of cases has survived *White* (*supra*) has not yet been authoritatively decided. In *White* at 507H-508A Lord Hoffmann made the following comment upon Lord Oliver's analysis:

"This is an elegant, not to say ingenious, explanation, which owes nothing to the actual reasoning (so far as we have it) in any of the cases. And there may be grounds for treating such a rare category of case as exceptional and exempt from the *Alcock* control mechanisms. I do not need to express a view because none of the plaintiffs in this case come within it."

63. A degree of further support for Lord Oliver's observations can be drawn from Lord Slynn's speech in *W v Essex CC (supra)*, where he indicated that he did not regard as unarguable a claim for psychiatric injury to the parents suffered as a result of their sense of responsibility for having caused or failed to prevent the sexual abuse suffered by their children: see *ibid.* at 243G-244A.

64. Whether claimants in this category are to be treated as primary victims, as Lord Oliver treated them, or as secondary victims, as Lord Hoffmann appears to have viewed them, does not seem to me to be a matter of critical importance. There is room for the law to make provision for them on either basis.

65. My conclusion on this issue is that cases which fall into this particular category raise materially different considerations from those which arise in the instant case, and that the authorities would not necessarily preclude such cases from receiving separate treatment were I to rule against the Claimant on the preliminary issue which I have to decide. I therefore do not find myself assisted by the submission based on the case of Watkins LJ's engine driver.

Duty Owed by Victim of Self-Inflicted Injuries: Policy Considerations

66. Although it appears from the body of authority referred to above that the preponderance of opinion is 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 his injuries, there is no decision on the point which is binding upon this court. Accordingly the court, in the light of such guidance as has been given, including such assistance as may be gleaned from the Commonwealth decisions, must reach its own conclusion. It is at this stage that policy considerations come into play.

67. I observe, first, that since a claim for psychiatric illness suffered by a secondary victim in consequence of injury to a primary victim is not admitted by our law unless the three elements of the control mechanism are present, it follows 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. For reasons which will shortly appear, I regard that as a matter of significance.

68. In the second place, the issue which I have to resolve raises, as it seems to me, a question which impinges upon a person's right of self-determination. Mr Eklund has drawn my attention to a decision of the German Bundesgerichtshof in a case reported at (1971) BGHZ 56, 163, where this problem was identified. A translation of an extract from that judgment (translated by Mr Tony Weir) which appears in *A Comparative Introduction to the German Law of Torts* by Professor Basil Markesinis (3rd ed., 1994, p.109), was produced to the court. That case concerned a wife's claim for damages for psychiatric injury suffered by her as a secondary victim of an accident in which her husband had died and which had been partly caused by his own negligence. I shall describe in a moment how the court dealt with the question of contribution between joint tortfeasors in that case. The immediately relevant passage in the judgment of the German court relates to the court's observation that if the death of the primary victim had been exclusively caused his own negligence, the claimant could not have recovered anything in respect of her injuries. The court reasoned 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 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" (p.113).

69. Both counsel maintain that self-harming, whether by negligence or deliberately, would not be expected to give rise to any criminal liability. Mr Eklund, relying upon the opinion of the Bundesgerichtshof, argues that to impose the proposed liability for psychiatric harm caused to another through such acts would be to curtail the right of self-determination and the liberty of the individual. There is, of course, a duty not to

cause foreseeable physical injury to another in such circumstances, but in my judgment to extend that duty so as to bring within its compass purely psychiatric injury would indeed be to create a significant further limitation upon an individual's freedom of action. That seems to me to be a powerful objection to the imposition of such a duty.

70. Mr Eklund maintains that there are strong policy reasons for holding that the victim of self-inflicted injury, whether caused negligently or deliberately, should not owe a duty of care to someone who suffers psychiatric injury as a result of seeing him in an injured state. He postulates certain examples, in each of which A causes himself harm and B, who fulfils all the preconditions for classification as a secondary victim, suffers psychiatric injury as a result of seeing A in his injured state: (1) A commits suicide and the body is found by B, his son; (2) A negligently wounds himself with a kitchen knife in front of B, his wife; (3) A suffers extensive loss of blood as a result of a fall caused by his own negligence and is found by B, his mother. In all these circumstances, he submits, public policy ought to prevent B from suing A or A's estate if he or she suffers psychiatric injury in consequence of what he has seen.

71. His argument is as follows. The first *Alcock* control mechanism means that such claims must of necessity be between close relatives. Regrettably, the suffering of close relatives for self-induced or natural reasons is an inherent part of family life. It is only when someone else inflicts the injuries that the incident is taken out of the category of everyday family life and into the law of tort. There seems to me to be force in this argument. Tragedy and misfortune may befall any family. Where the cause arises within the family there would, in my view, have to be good reason for further extending the law to provide a remedy in such a case.

72. That takes me to a related point, which in my view is of some importance. Home life may involve many instances of a family member causing himself injury through his own fault. Should the law allow one family member (B) to sue another family member (A) or his estate in respect of psychiatric illness suffered as a result of B either having been present when the injury was sustained or having come upon A in his injured state? Mr Mason argues that such claims will be rare, because such events will not normally cause psychiatric illness, and because the courts may be expected strictly to enforce the requirement that a secondary victim must show that the circumstances were such that a person of normal fortitude might foreseeably suffer psychiatric harm. That may be so, but experience shows that it is not only successful claimants who sue. To allow a cause of action in this type of situation is to open up the possibility of a particularly undesirable type of litigation within the family, involving questions of relative fault as between its members. Issues of contributory negligence could easily arise, not only where the self-inflicted harm is caused negligently, but also where it is caused intentionally. To take a simple example, A, while drunk, seriously injures himself. B, his wife, suffers nervous shock. What if A was drunk because B had unjustifiably threatened to leave him for another man or had fabricated an allegation of child sexual abuse against him? The possibilities are endless. In a case where A's self-harm is deliberate, the possibility that B's claim may be met by a defence of contributory negligence, alleging that B's behaviour caused A to harm himself, is an alarming one. And that is without allowing for the further impact of possible Part 20 claims being brought against other members of the family.

73. I appreciate, of course, that one member of the family may already sue another family member in respect of physical injury caused by that other, so that in cases of physical injury there is already the potential for personal injury litigation within the family; but the fact that family members have the same right as others to make a claim for physical injury does not necessarily mean that they should have the right to make a claim for a different kind of harm in respect of which, because of the first *Alcock* control mechanism, others have no such right. Further, where a family member suffers psychiatric harm as a result of the self-inflicted injuries of another family member, the psychiatric illness in itself may well have an adverse effect upon family relationships which the law should be astute not to exacerbate by allowing litigation between those family members. In my judgment, to permit a cause of action for purely psychiatric injury in these circumstances would be potentially productive of acute family strife.

74. Mr Mason's best point in answer to these policy considerations, as it seems to me, derives from the passage in Lord Oliver's speech in *Alcock* (*supra*) at 418H to which I have already referred, where Lord

Oliver referred to the anomaly that might arise where an accident, though not solely caused by the primary victim, has been materially contributed to by his negligence. Lord Oliver pointed to the unfair situation which would arise if a claimant were to recover damages in full for his or her traumatic injuries from a person who had in fact been responsible in only a minor degree whilst he in turn remained unable to recover any contribution from the person primarily responsible, since the latter's negligence vis-à -vis the claimant would not even have been tortious.

75. I fully recognise the force of this objection to a denial of a duty of care in the type of situation under consideration in this judgment, but it does not seem to me to outweigh the policy considerations to which I have referred above. There is no easy answer to the point, save to observe that, as has often been pointed out, the whole area of the law relating to so-called nervous shock cases is bedevilled by inconsistencies and apparent injustices. The particular anomaly identified by Lord Oliver, which springs from the wording of section 1(1) of the Civil Liability (Contribution) Act 1978 providing that a tortfeasor may recover contribution "from any other person liable in respect of the same damage", is perhaps more easily capable of remedy by Parliament than some of the other problems created by the existing limitations on liability for negligently caused psychiatric harm. One possibility is suggested by the judgment of the Bundesgerichtshof *(supra*), to which I have already referred. In that case the court held that the secondary victim's damages ought to be reduced to the extent of the primary victim's contributory negligence. The court pointed out that:

"… if the critical reason for the plaintiff's suffering this injury to her health was her close personal relationship to her husband, it is only fair that her claim should be affected by his fault in contributing to the accident" (p.112).

76. I note that this is not a suggestion which has found favour in the Law Commission's report on*Liability for Psychiatric Illness* (1998), which states, at para. 5.39, that it would be contrary to the principle that the defendant owes a separate duty of care directly to the claimant, and would mean that the claimant was unable to obtain full compensation for his or her psychiatric illness. That is of course true, but the competing policy considerations in this area of the law are such that I suspect that any statutory reform is likely to have its own drawbacks and imperfections.

77. Mr Eklund submits that any decision that there should be civil liability to a secondary victim who suffers psychiatric harm in consequence of a primary victim's self-inflicted injuries is better left to Parliament than taken by the courts. It seems to me that there is substance in this submission. There is ample support in the authorities to which I have referred for the argument that Parliament is the best arbiter of what the public interest requires in this difficult field of the law. Indeed, in *Alcock* (*supra*) *at* 419A, Lord Oliver, in a passage immediately after the passage to which I have referred above, said:

"Policy considerations such as this could, I cannot help feeling, be much better accommodated if the rights of persons injured in this way were to be enshrined in and limited by legislation as they have been in the Australian statute law…."

78. In this context, it is interesting to note that in *Jaensch v. Coffey* (*supra*) Deane J at 601-602 drew attention to the fact that three States in Australia had introduced legislation to deal with this area of the law and that in none of them did the legislation extend to cover liability in respect of nervous shock sustained as a consequence of the death, injury or peril of the person whose negligence caused the accident.

79. The Law Commission's report, at paras. 5.34-5.44, considers the very question which is before me as a preliminary issue. The report gives weight to the argument that to create a duty of care in the situation under consideration would place an undesirably restrictive burden on a person's self-determination, but it appears not to take account of the potentially destructive impact upon family relationships of the introduction of such a duty. It recommends that legislation should provide for such a duty to exist where the defendant has negligently harmed himself, but for the courts to have scope to decide not to impose the duty where the defendant has chosen to harm himself. The purpose of the latter provision would be to allow room for respect to be accorded to the defendant's right of self-determination. At common law, a claimant who has a cause of action where he is injured by the defendant's negligent act has a stronger claim if the defendant acted intentionally. If the Law Commission's proposal commends itself to Parliament, a somewhat

paradoxical situation will arise, in which it will be in the defendant's interest to argue that the act by means of which he caused the harm was deliberate, while the claimant will be seeking to persuade the court that it was inadvertent.

Conclusion

80. I have come to the conclusion that the policy considerations against there being a duty of care in the situation under consideration in this judgment clearly outweigh the arguments in favour of there being such a duty. Reinforced in my conclusion by the authorities to which I have referred, I find that there is no duty of care owed by a primary victim of self-inflicted injuries towards a secondary party who suffers psychiatric illness as a result of those injuries.

81. I therefore answer the three questions of law as follows:-

1. A primary victim does not owe a duty of care to a third party in circumstances where his self-inflicted injuries caused that third party psychiatric injury.

2. On the agreed facts the First Defendant did not owe the Claimant a duty of care not to harm himself.

3. On the agreed facts the First Defendant did not owe the Claimant a duty of care not to cause him psychiatric injury as a result of exposing him to the sight of the First Defendant's self-inflicted injuries.