[2020] IEHC 160

THE HIGH COURT

2018 No. 652P

BETWEEN

LISA SHEEHAN

PLAINTIFF

AND

BUS ÉIREANN/IRISH BUS

AND

VINCENT DOWER

DEFENDANTS

JUDGMENT of Mr Justice David Keane delivered on the 3rd April 2020

Introduction

1. In this personal injuries action, the plaintiff Lisa Sheehan seeks damages for the psychiatric injury that resulted from her presence at the scene of a road traffic accident. The defendants are the persons responsible for each of the two vehicles directly involved in that collision.

2. The case raises two fundamental issues on the law governing liability for negligently inflicted psychiatric damage. First, what is the nature and scope of the duty of care not to cause a reasonably foreseeable psychiatric injury to a person who is not directly involved in the accident caused by that breach of duty? Second, does the law recognise a right of recovery for the psychiatric consequences of witnessing an accident, if the primary victim is the tortfeasor rather than a blameless third party?

Background

3. The accident occurred after dark on the winter evening of 28 January 2017, at a point on the N72 national secondary road in the townland of Gearanaskagh, a short distance west of Mallow, County Cork. A passenger bus travelling east was struck head on by a single occupant motor car travelling west. The bus was owned and operated by the first defendant Bus Éireann. The driver of the car was killed in the crash and the second defendant Vincent Dower is the nominated representative of that vehicle's insurer, FBD Insurance ('FBD').

4. When the accident happened, Ms Sheehan was driving alone on the westbound carriageway of the N72, commuting from her job as a hairdresser in Cork city to her home in the village of Banteer in North Cork. Although Ms Sheehan did not see the collision take place ahead of her on the dark roadway, some debris from it struck her car, prompting her to brake to a halt. On getting out of her car to investigate, she saw the damaged bus, stationary on the eastbound carriageway to her right. Then she saw the car, motionless and severely damaged, a short distance in front of her on the westbound carriageway. There was diesel oil and, perhaps, blood on the roadway. She ran to the car and, on peering into the back, glimpsed the badly disfigured and partly decapitated body of what looked like a child, which gave her a tremendous fright. Although in shock, Ms Sheehan called the emergency services on her mobile phone to report the accident and summon help. Before help arrived, she searched the surrounding area for other victims who might have been thrown from the car. Providentially, there were none. The

mutilated body in the back was that of the adult driver; it had been propelled there by the tremendous forces involved in the impact between the two vehicles. Ms Sheehan later encountered the driver of the bus, whose face was covered in blood. After the emergency services arrived, a guard who was concerned about her mental state advised Ms Sheehan to have someone come to collect her and to immediately consult her general practitioner but, in hindsight perhaps rashly, Ms Sheehan decided to drive home as she did not want to alarm her husband.

5. The deceased driver of the car and the driver and occupants of the bus were strangers to Ms Sheehan.

6. Nonetheless, because of what she witnessed at the scene of the accident, Ms Sheehan experienced a depressive adjustment reaction and developed a moderately severe post-traumatic stress disorder for which the prognosis remains guarded. Those are the injuries for which she claims damages.

7. Ms Sheehan pleads that those injuries have resulted from the negligent operation or control of one, or both, of the vehicles involved in the crash, making one, or both, of the defendants liable to her in damages.

8. Bus Éireann denies negligence. FBD admits that the accident was caused by the negligence of the driver of the car. Its solicitors have now taken over the defence of the action on behalf of both defendants.

9. Both sides acknowledge that the resolution of the case turns on the plea advanced by FBD that, on the facts presented, Ms Sheehan's psychiatric injuries do not give rise to any cause of action recognised by the law, in that the defendants did not owe her any duty of care for two reasons; first, because Ms Sheehan was merely a 'secondary victim' of the accident and cannot meet the additional requirements that, as a matter of policy, the law imposes on persons in that category, to establish the existence of such a duty; and second, because the driver of the car was a 'primary victim' of self-inflicted injuries and, as such, owed no duty to a secondary victim, such as Ms Sheehan, who suffered psychiatric injury as a result. In support of the first proposition, the defendants rely on the principles developed in a trilogy of House of Lords decisions commencing with *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, continuing with *Page v Smith* [1996] AC 155, and culminating in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (on appeal from *Frost v Chief Constable of South Yorkshire Police* [1998] QB 254 (CA)). In support of the second, they rely on the judgment of Cazalet J in the High Court of England and Wales in *Greatorex v Greatorex* [2000] 1 WLR 1970.

The proceedings

10. A personal injuries summons issued on behalf of Ms Sheehan on 25 January 2018. Each of the defendants entered an appearance on 6 March 2018. The defence of FBD was delivered on 15 May 2018 and that of Bus Éireann on 4 July 2018. Ms Sheehan issued a notice of trial on 25 July 2018.

11. The trial of the action took place in Cork on 21 and 22 January 2020. Ms Sheehan was represented by Eoin Clifford SC and John Lucey SC with Colmán Ó Donnchadha BL, instructed by Martin A. Harvey, Solicitors. The defendants were represented by John Lynch SC with Donal T. McCarthy BL, instructed by O'Riada, Solicitors. I am grateful to counsel for their deft submissions.

The Evidence

12. There is only very limited conflict between the parties on the material facts.

13. Just two witnesses gave evidence at trial. They were Ms Sheehan, the plaintiff, and John G. Sullivan, an independent expert engineer and assessor retained on her behalf. The defendants did not call any witnesses.

14. By agreement between the parties, various medical reports were admitted into evidence without formal proof. It is to the contents of those reports and to Ms Sheehan's testimony on the injuries she sustained that I now turn.

Ms Sheehan's psychiatric injury

15. Ms Sheehan is a married woman with two young children. At the time of accident, she was 34 years old, and working as a hairdresser.

16. On Tuesday, the 31 January 2017, three days after the accident, she went to her general practitioner, Dr Jacinta Barry, having suffered a panic attack at work. She was tearful and agitated and reported that she could not get the images of the accident out of her mind. Dr Barry prescribed anxiolytic (anxiety inhibiting) and anti-depressant medication, referred Ms Sheehan for counselling, and certified her as unfit for work over the next five weeks. Due to subsequent recurrences of acute anxiety, Ms Sheehan had to take further short periods off work intermittently after that.

17. Ms Sheehan's symptoms did not resolve, and in May 2017 Dr Barry referred her for evaluation to Dr Mairead O'Leary, consultant psychiatrist. Dr O'Leary saw Ms Sheehan on 2 October 2017.

18. Ms Sheehan described her condition to Dr O'Leary in the following way. She used to be outgoing but was now completely different. She slept badly and frequently woke up with nightmares. She felt distant from everyone, even her husband and children, which distressed her. She had outbursts of anger, which made her feel guilty. She was continuously irritable and on edge. She thought constantly about the victim of the accident and could not stop ruminating about what she had seen. She tried to avoid passing the scene of the accident, as doing so caused her to have very intense and unpleasant flashbacks. Her condition since the accident had put a great strain on her family relationships. Normal intimacy with her husband had ceased. Although her family had been very happy in their rural home prior to the accident, Ms Sheehan had developed great anxiety about the associated level of family car travel and wanted to move to an urban area where it would be less, although her husband did not. This had become a further source of strain and friction within the family.

19. Dr O'Leary observed that Ms Sheehan described, and was in, a state of autonomic hyperarousal and hypervigilance (which I understand to mean one of persistent, involuntary anxiety and alertness).

20. Dr O'Leary diagnosed classic post-traumatic stress disorder ('PTSD'), consequent upon Ms Sheehan's acute stress reaction to what she experienced at the scene of the accident. Dr O'Leary recommended psychotherapy and referred Ms Sheehan to a clinical psychologist for eye movement desensitisation and reprocessing ('EMDR') therapy and counselling. In offering a prognosis, Dr O'Leary noted that fifty percent of those who experience PTSD recover within twelve months before concluding that, in view of Ms Sheehan's condition when assessed almost ten months after the accident, she was unlikely to be in that cohort. However, Dr O'Leary was hopeful that, in time, Ms Sheehan would make a full recovery, subject to a twenty-five percent chance of further anxiety, depression or stress-related conditions in the future.

21. Dr R.M. Kennefick, a general practitioner, examined Ms Sheehan on 5 June 2018 as an independent medical expert on behalf of the defendants. In his report, he acknowledged that her condition satisfies the requirements for a diagnosis of PTSD, although he felt that she had made good progress in the time since her accident; that her residual symptoms were not of a significant nature; and that she should make a satisfactory recovery within two years of the date of the accident.

22. Dr O'Leary met with Ms Sheehan for a further review on 8 May 2019. Ms Sheehan reported that her condition had not improved. Her family relationships were still strained. She still wanted to move to an urban area to minimise her family's car travel. She had ceased her work as a hairdresser in February 2019, as she had been unable to concentrate. She remained hyper-aroused and hypervigilant. She continued to ruminate on the accident she had witnessed, and to have flashbacks and nightmares about it.

23. Dr O'Leary recorded that, during that assessment, Ms Sheehan became tearful and sad, and was visibly anxious and agitated, expressing apprehension and pessimism about the future. Dr O'Leary concluded that Ms Sheehan had still not then recovered from her PTSD, despite the medication she was on (including the occasional use of sedatives, as well as tranquilisers), and the counselling and therapy she was undergoing.

24. Dr John Dennehy, consultant psychiatrist, assessed Ms Sheehan as an independent medical expert on behalf of the defendants on 10 September 2019. He too expressed the opinion that Ms Sheehan had experienced a moderately severe post-traumatic stress disorder after an initial stress reaction at the scene of the accident, together with a depressive adjustment reaction, which had improved but which had a persistent psychosocial impact, especially on her family relationships.

25. Dr Dennehy noted that Ms Sheehan was to continue with therapy and medication. Nonetheless, he expressed the view that the prognosis for her recovery remained guarded and that it would certainly take some further time.

26. Thus, I conclude – and the defendants do not dispute for the purpose of these proceedings – that Ms Sheehan has sustained a significant psychiatric injury.

Liability for negligently inflicted psychiatric injury

27. As the authors of McMahon and Binchy, *The Law of Torts* (4th ed., 2013) explain (at para. 17.10), whereas most common law jurisdictions were initially hostile to the assertion of a duty to avoid causing 'nervous shock' (as the law then described psychiatric injury), Ireland was not.

28. In *Bell v Great Northern Railway Company of Ireland* (1890) 26 LR (Ir) 428 (Ex Div), a case that arose from the terrible 1889 Armagh rail disaster, Chief Baron Palles, who has been described as the embodiment of the common law in Ireland in the nineteenth century (V.T.H. Delany, *Christopher Palles: His Life and Times* (Dublin, 1960) (at p. 3)), expressed the now orthodox view that if negligence causes fright, which, in turn, causes psychiatric injury, then liability may follow even if that injury occurs or develops over time, rather than instantaneously (at 442).

29. In reaching that conclusion, the Chief Baron expressly refused to follow the judgment delivered two years earlier by Sir Richard Couch for the Judicial Committee of the Privy Council in *Victorian Railway Commissioners v. Coultas* (1888) 13 App. Cas. 222, confirming the view then prevalent that damages arising from a mere sudden terror, unaccompanied by any physical injury, but occasioning psychiatric injury, could not be considered a consequence which, in the ordinary course, would flow from the negligent conduct that caused that fright. The plaintiff in that case had suffered severe shock (and subsequently, as Palles CB noted, a miscarriage) when a train narrowly missed the horse-drawn buggy in which she was travelling, due to the negligence of the gate-keeper at a level crossing. The Chief Baron criticised the assumption made by the Privy Council in that case that, as a matter of law, nervous shock was something that affected the mental functions but was not itself a peculiar physical state of the body (*i.e*. not really a separately cognisable 'injury'), before concluding that '[t]his error pervades the entire judgment' (at 441).

30. The Chief Baron went on to explain that he did not have to follow that authority because he was bound instead by the earlier decision of the Court of Appeal in Ireland in *Byrne v Great Southern and Western Railway Company* (Unreported, February 1884), upholding a verdict for a plaintiff, the superintendent of the telegraph office at Limerick Junction railway station, who, although physically unharmed, had suffered psychiatric injury from the shock he received when a train crashed through a buffer and then the wall of that office after railway points were negligently left open.

31. Just over a century later, in *Mullaly v Bus Éireann* [1992] ILRM 722 (HC), Denham J relied strongly on the decision in *Bell* in support of her conclusion that the post-traumatic stress disorder that the plaintiff developed after seeing her husband and three of her sons in hospital, badly injured in the immediate aftermath of a serious road traffic accident, amounted to a psychiatric illness that was a readily foreseeable consequence of the defendant's negligence in causing the accident.

32. The leading modern authority on negligently inflicted psychiatric injury is the decision of the Supreme Court in *Kelly v Hennessy* [1995] 3 IR 253. In that case, the plaintiff was informed by telephone that her husband and two daughters had just been seriously injured in a car crash and immediately afterwards saw each of them in an appalling condition in hospital. As a result, she developed post-traumatic stress disorder. Hamilton CJ summarised the five things that a plaintiff must establish to succeed in an action for damages for negligently inflicted psychiatric injury (at 258-260). Shortly stated, they are:

    (i) that the plaintiff suffered a recognisable psychiatric illness;

    (ii) that the psychiatric illness was shock induced;

    (iii) that the shock (and, hence, the consequent psychiatric illness) were caused by the negligence of the defendant;

    (iv) that the shock was sustained by reason of actual or apprehended physical injury to the plaintiff or another person; and

    (v) that the defendant owed the plaintiff a duty of care not to cause the plaintiff a reasonably foreseeable injury in the form of psychiatric illness.

33. The resolution of the present case turns on the application of the fifth limb of the test just described. Did the defendants owe Ms Sheehan a duty of care?

34. The most recent authoritative statement of the test for the existence of a duty of care is that of Keane CJ in *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 IR 84 (at 139):

> 'There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of "proximity" or "neighbourhood" can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in *Ward v. McMaster* [1985] IR. 29, by Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 and by the House of Lords in *Caparo Industries plc. v. Dickman* [1990] 2 AC 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a *prima facie* duty of care restrained only by undefinable considerations …"

The first argument

35. The defendant's first argument is that Ms Sheehan was merely a secondary victim of the road traffic accident in this case and that, as such, even if she can establish that her

psychiatric illness was a reasonably foreseeable consequence of the defendants' negligence, she cannot bring herself within the restricted category of such victims whose claims can succeed under the rigid test developed by the UK House of Lords in the cases of *Alcock, Page* and *White*, already cited.

36. In *Alcock* (at 409), Lord Oliver divided psychiatric injury cases into two categories, '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 a passive and unwilling witness of injury caused to others', before adopting the term 'primary victim' to refer to a person in the first category (at 406). In *Page* (at 184), Lord Lloyd appeared to narrow the concept of primary victim to a person 'directly involved in the accident' and 'within the range of foreseeable physical injury'.

37. As summarised by Lord Steyn in *White* (at 496), to succeed in a claim for damages for psychiatric injury as a secondary victim, it is necessary to establish: (i) that the plaintiff had a close tie of love and affection with the person killed, injured or imperilled; (ii) that the plaintiff was close to the incident in time and space; (iii) that the plaintiff directly perceived the incident rather than, for example, hearing about it from a third person. Having been first enunciated by Lord Ackner in *Alcock* (at 402), those requirements are frequently referred to as the *Alcock* control mechanisms (see, for example, the judgment of Lord Hoffman in *White* (at 509)).

38. The defendants point out that Ms Sheehan had no ties with the driver who died in the accident in this case. They also argue – relying heavily on Ms Sheehan's description in both her pleadings and her evidence of 'coming upon' the scene of the accident – that she was not particularly close to the incident in time and space at the moment when it occurred. Finally, because Ms Sheehan acknowledges that she did not see the collision between the two vehicles on the dark road, they submit, in effect, that she did not directly perceive the incident.

i. the primary/secondary victim distinction

39. On this question, I consider *Curran v Cadbury (Ireland) Ltd* [2000] 2 ILRM 343, a decision of Judge McMahon in the Circuit Court, a most persuasive authority, due both to the clarity and thoroughness of its analysis and to the venerable position that Judge McMahon (later Mr Justice McMahon) holds as co-author of McMahon and Binchy, *The Law of Torts* (4th ed, 2013), the leading practitioner's work.

40. In that case, Judge McMahon observed (at 347):

> '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 A*lcock v. Chief Constable of South Yorkshire Police* [1992] 1 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 CJ (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."'

41. And later (at 359-360):

> '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. White, in effect, held that rescuers and employee claimants who up to then had been considered to be entitled to recover without having to concern themselves with 'the control mechanisms', are now treated as secondary victims also. To succeed, therefore, a rescuer must now show that he has a 'close' relationship with the injured person(s) and that he complies also with the other policy requirements. White also decided that there is no general duty of care owed by the employer to his employees in respect of psychiatric illness, and employees, like other secondary victims, must now also surmount the policy control mechanisms if they wish to recover. Finally, the English courts have held in *Page v. Smith, supra*, that if the defendant could foresee personal injury (i.e. physical or psychiatric illness) he will be liable if the claimant only suffers psychiatric illness.
>
> In contrast, to recover for this type of injury in the Irish courts, the claimant must comply with the five conditions laid down by Hamilton CJ (with whom Egan J agreed) in *Kelly v. Hennessy*. Nowhere in the Chief Justice's judgment is there any

reference to primary or secondary categories. Denham J in the same case seemed to accept the distinction, and indicated that to be a primary victim one had to be a 'participant' in the events. As opposed to the English position, Hamilton CJ also held that to recover in Ireland for nervous shock, the defendant had to foresee nervous shock and not merely personal injury in general. When addressing these issues in Kelly, the Irish courts relied heavily on the Australian approach as expressed in *Jaensch v. Coffey* [(1984) 155 CLR 549 (HCA)], an approach which has been rejected by the English Courts.'

Two things become clear from this: first, the law on this topic is far from settled in either jurisdiction; second, a divergence of approach between the two jurisdictions is becoming increasingly obvious and perhaps inevitable. Several questions have yet to be confronted by the Irish courts: should the law in this jurisdiction accept the primary/secondary classification?; are there to be other classes — tertiary victims for example?; if not, are there to be exceptions to the primary/secondary categories — e.g. rescuers and/or employees?; is 'participation' to be the criterion in determining primary victims?; is it necessary for a defendant to foresee nervous shock or is it sufficient if he foresees 'personal injury' of some kind?; are the occupational stress cases like *Walker v. Northumberland County Council* [1995] 1 All ER 737 where the plaintiff is clearly a primary victim, but where the injury is not shock induced, affected by these developments?; and perhaps, most fundamental of all: is the distinction between physical and psychiatric injury medically or legally defensible nowadays? (See Lord Lloyd of Berwick in *Page v. Smith* [1996] 1 AC 155, at p. 188.)

The House of Lords' decision in White is somewhat reminiscent of its earlier decision in *Murphy v. Brentwood District Council* [1991] 1 AC 398 where it resiled from its earlier approach in *Anns v. Merton London Borough Council* [1978] AC 728 on the general duty of care issue. This withdrawal was never followed by the Irish courts, who in *Ward v. McMaster, supra*, and a succession of cases thereafter, kept faith with the *Anns* approach. From the Supreme Court's reliance on the Australian authorities in *Kelly*, it would seem that the Irish courts will not be overawed by *White* and may well choose, as it did in *Ward v. McMaster*, to go its own road, especially since *White* has its critics (see *supra*).'

42. *Fletcher v Commissioners or Public Works* [2003] 1 IR 465 was a case of acknowledged psychiatric injury – in the form of an anxiety disorder linked to the risk of contracting mesothelioma - caused by the plaintiff's exposure to asbestos dust through the admitted negligence of the defendants as his employers. The requirement to establish that the psychiatric injury was shock induced, under the second limb of the test in *Kelly*, was an obvious obstacle to the success of any such claim, which suggests that an extension of the law on policy grounds would have been necessary to enable it to succeed.

43. Keane CJ noted (at 475) that the Supreme Court was not concerned in that appeal with any distinction between 'primary victims' and 'secondary victims', before pointing out

that, while the plaintiff in *Kelly* undoubtedly belonged to what the English cases describe as the category of 'secondary victims', the decision that she was entitled to recover damages had been upheld by the Supreme Court on the basis that her claim met the five generally applicable conditions identified by Hamilton CJ in that case.

44. In his judgment in *Fletcher*, Geoghegan J was careful to say, in referring to *Alcock*, that he did so to elicit general principles governing claims for psychiatric injury, and not to approve or disapprove it in light of the great problems with it identified in subsequent cases (at 503), before later observing that Lord Oliver's distinction between primary and secondary victims was of little importance for the case at bar (at 505), and ultimately concluding that it was unnecessary to express any final opinion on the matter 'not least because the primary/secondary distinction has been criticised (see for instance the judgment of His Honour Judge McMahon in *Curran* [already cited] (at 519).'

45. In *Cuddy v Mays* [2003] IEHC 103, (Unreported, High Court, 28 November 2003), a case brought by a hospital porter who suffered psychiatric injury when a number of his close relatives and friends who had been killed or injured in a road traffic accident were brought to the hospital where he was on duty, Kearns J refused an invitation to further clarify the application in Ireland of the legal principles identified in *Alcock*, *Page* and *White*, on the basis that. to resolve the matter, it was simply necessary to rely on the authority of the Supreme Court decision in *Kelly*.

46. In the course of argument, I was referred to the decision of the Supreme Court in *Devlin v National Maternity Hospital* [2008] 2 IR 222, upholding the decision of the High Court ([2004] IEHC 437, (Unreported, O'Donovan J, 1 July 2004)) to grant a non-suit. The plaintiffs in the case were the parents of a stillborn infant, upon whom the defendant hospital had performed a post-mortem without the parents' consent, removing and retaining some of the infant's organs. The infant's mother had developed PTSD after learning of those events. At trial and on appeal, the case was decided on the basis that the plaintiffs could not meet the fourth requirement to establish liability under the test in *Kelly* because there was no evidence that the mother's shock was sustained by reason of actual or apprehended physical injury to her or to another person. The plaintiffs asked the Supreme Court to extend the law by disapplying that limb of the test. The Supreme Court (*per* Denham J at 239-240) declined to do so on policy grounds. The situation in this case is entirely different.

47. It only remains to note, as summarised by the authors of C*harlesworth & Percy on Negligence* (13th ed, 2014) (fn. 381, para. 2-137):

> 'The primary/secondary distinction has failed to take root in Australia (*Tame v NSW: Annets v Australian Stations Pty Ltd* (2003) 211 CLR 317, HCA) and New Zealand (*van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, NZCA), and has been rejected in Canada (*Mustapha v Culligan of Canada Ltd* (2007) 275 DLR 473, Ont CA) (appeal dismissed [2008] 2 SCR 114, SCC, without discussion of the point). Some members of the House of Lords have questioned whether the distinction ought to be retained: see *Rothwell v Chemical Insulating Co*

[2008] 1 AC 381, at [52] per Lord Hope, [104] per Lord Mance; *Corr v IBC Vehicles Ltd* [2008] 2 WLR 499, at [54] per Lord Neuberger.'

48. Having considered these authorities, I conclude as follows. First, the test for liability for negligently inflicted psychiatric injury is that set out by Hamilton CJ in *Kelly*. The test for the existence of a duty of care, the fifth requirement of the test in *Kelly*, is that articulated by Keane CJ in *Glencar Exploration plc*. A rigid primary/secondary victim distinction, entailing an inflexible adherence to the *Alcock* control mechanisms, has no role to play in the application of either. To paraphrase the words of McCarthy J in *Irish Shell Ltd v Elm Motors Ltd* [1984] IR 200 (at 227), whilst the judgments in cases decided in the English Courts at all levels will, on a great many occasions, provide convenient and, indeed, convincing statements of principle and attractive arguments in favour of such principles, they do no more than that.

ii. is Ms Sheehan a primary or secondary victim of the accident in this case?

49. It is convenient at this point to consider in a little more detail the evidence on the nature and extent of Ms Sheehan's involvement in the accident. To recap briefly, although Ms Sheehan did not see the accident happen ahead of her on the dark roadway, some debris struck her car, prompting her to brake to a halt, after which she got out to investigate.

50. In evidence at trial, Ms Sheehan stated that when the debris struck her car, she also heard a loud bang, although she acknowledged that she had made no mention of that in the statement that she gave to the guards on 6 February 2017. Ms Sheehan accepted that, in describing the incident to her general practitioner and, indeed, in both her pleadings and her evidence to the court, she had described 'coming upon' the scene of the accident.

51. In his evidence to the court, John G. Sullivan, the independent expert engineer and assessor retained on Ms Sheehan's behalf, stated that he had inspected Ms Sheehan's vehicle on 3 February 2019. While that was some considerable time after the accident, the vehicle had not been repaired. He observed that a small hole had been punched in the nearside front bumper; a headlamp washer cover was missing from it; and a separate slight scratch was evident close to the wheel arch.

52. Mr Sullivan had been furnished with a copy of the sketch of the accident scene from the garda abstract report. Considering the measurements recorded on that sketch in conjunction with Ms Sheehan's testimony, and assuming that Ms Sheehan's vehicle had been travelling at a speed of 80km/h and had begun to brake when struck by the debris before coming to a halt beside the resting position of the damaged bus, then, by Mr Sullivan's estimate, Ms Sheehan's vehicle was approximately 100 metres from the point of impact when the collision between the car and the bus occurred ahead of her. Mr Sullivan drew additional support for that conclusion from his opinion that, given the physical forces involved in the crash and his experience of similar collisions, he would not expect debris to have travelled much more than 100 metres from the point of impact.

53. Because Ms Sheehan did not actually see the car collide with the bus in the dark and because, in that context, Ms Sheehan herself described 'coming upon' the scene of the collision when she got out of her own car, the defendants urge me to conclude that she was not a 'primary victim' of the accident. For the reasons I have already given, I do not think that anything turns on the point. But lest I am mistaken in that regard, I propose to address it. Ms Sheehan's car was directly struck by debris from the collision and she brought her vehicle to a stop on a dark country road for no other reason than that she perceived something disturbing or alarming had occurred in the immediate vicinity. As a motorist within the radius of flying debris from the collision, I am satisfied that she was in the area of risk of foreseeable physical injury and, as a motorist whose vehicle was struck by flying debris, I am satisfied that she was a participant in the accident, albeit one on the periphery of it. Applying the definition of 'primary victim' so construed, I would conclude that Ms Sheehan was a primary, rather than secondary, victim of the accident, were it necessary to consider and apply that distinction for the purpose of the law on liability for negligently inflicted psychiatric injury – although I do not accept that it is.

iii. the position of Ms Sheehan as a rescuer

54. Although the defendants have contested Ms Sheehan's status as a participant in the accident, they do accept that she was a rescuer. Ms Sheehan approached the crashed car to offer help. On seeing the body of its occupant, she telephoned the emergency services for assistance. While waiting for those services to arrive, she searched the surrounding area in case there were other occupants who had been thrown from the vehicle. She did those things in darkness in the immediate aftermath of a serious accident on a national secondary route, before any steps could be taken to properly alert other motorists to that hazard. Thus, it would be difficult to conclude that Ms Sheehan was not exposed to danger through her selfless and civic-spirited actions.

55. In considering the modern law on the entitlement of rescuers to recover damages for negligently inflicted injury, the starting point remains the celebrated dictum of Cardozo J for the Court of Appeals in New York in *Wagner v International Railway Co* 133 NE 437, 232 NY 176 (at 180):

> 'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their efforts within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.'

56. Though not disapproving of it, Lord Hoffman in *White* described this as 'a florid passage' that had led some commentators to conclude, wrongly, that rescuers form a special class, whose members are entitled to recover outside ordinary negligence principles, whereas it plainly does no more than confirm their entitlement to successfully rely on those principles in appropriate cases (at 508). While, as Posner has pointed out, Cardozo's aphoristic style has its detractors, (Posner, *Cardozo – A Study in Reputation* (1990, Chicago) (at pp. 10-12)), I think it is fair to say that they have always been outnumbered by its admirers (see, for example, O'Dell, *Danger Invites Rescue – The Tort of Negligence*

and the Rescue Principle, (1992) 14 DULJ 65). But more importantly, for present purposes at least, the principle Cardozo J identified, in whatever language it is couched, has never since been seriously doubted in this jurisdiction. So, for example, in the Supreme Court in *Philips v Durgan* [1991] 1 IR 89 (at 96), Griffin J cited with approval the following passage from the judgment of Lord Denning MR in Vid*ean v British Transport Commission* [1963] 2 QB 650 (at 669):

> '... if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it.'

57. In *Alcock* (at 402), Lord Oliver expressed the view that those who suffer psychiatric injury in rescue cases fall into the primary victim category, as he defined it there. However, in *White* (at 499), Lord Steyn stated that 'in order to contain the concept of rescuer in reasonable bounds for the purposes of the recovery of compensation for pure psychiatric harm the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so.' Lord Hoffman expressed the view (at 509-510) that a rescuer can only recover for psychiatric injury if that person comes within the range of foreseeable physical injury in giving assistance at or after an accident or disaster. Hence, I understand that the defendants rely on these authorities to argue that Ms Sheehan cannot satisfy the threshold requirement to succeed in her claim as a rescuer.

58. The unsuccessful plaintiffs in *Alcock* were related to, or in a relationship with, various deceased victims of the 1989 Hillsborough football stadium disaster and had either witnessed the dreadful events from elsewhere in the stadium or followed the reports of those events on radio or television. Their psychiatric injury claims failed on the basis that they could not bring themselves within Lord Ackner's three qualifying criteria for secondary victims (the *Alcock* controlling mechanisms). The plaintiffs in *White* were police officers who had been involved in the rescue effort in the immediate aftermath of that disaster, although none of those officers had been, or had thought that he was, in personal danger.

59. In assaying a test for liability for psychiatric injury to a rescuer, both Lord Steyn and Lord Hoffman acknowledged the authority of the decision in *Chadwick v British Railways Board* [1967] 1 WLR 912. Mr Chadwick lived close to the scene on the 1957 Lewisham rail disaster in London and, immediately upon hearing of it, went directly there, where he acted as a rescuer, bringing aid and comfort for many hours to persons trapped among the wrecked train carriages. In an action brought after his death, Waller J found that his estate was entitled to recover for the psychoneurosis he developed as a result of the traumatic scenes he witnessed. Although the judgment of Waller J laid no emphasis on the point, Lord Steyn was careful to note the reference in it to the clear element of

personal danger in what Mr Chadwick was doing (at 499). Lord Hoffman observed that Lord Griffiths, who had been counsel for Mr Chadwick's estate, had stated in the Court of Appeal in *McLoughlin v O'Brian* [1981] 1 QB 599 (at 622) that Mr Chadwick might have been injured by a wrecked carriage collapsing on him as he worked among the injured and that a duty of care was owed to him as a rescuer in those circumstances (at 509).

60. Lord Steyn reasoned that, without the limitation that he had identified, 'one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover as in the *Alcock* case, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster might recover'. I am not persuaded by that argument for two reasons. First, I do not see how a ghoulishly curious spectator, who assisted only in some peripheral way with a rescue, might properly be characterised as a rescuer, rather than as a spectator or bystander. Second, I do apprehend an obvious injustice if that limitation is applied to a rescuer who provides significant, perhaps vital, assistance to a disaster or accident victim without being, or reasonably believing himself or herself to be, in immediate physical danger, but who nonetheless suffers psychiatric injury, such as PTSD, as a result of that experience.

61. In *Curran*, already cited, Judge McMahon had this to say about the arguments advanced by Lord Hoffman in support of the principle that that exposure to physical danger or the rescuer's reasonable belief of such exposure should be a condition precedent to the recovery by that rescuer of damages for negligently inflicted psychiatric injury (at 360-1):

> 'Lord Hoffman in *White* (with whom Lord Steyn agreed) in refusing to compensate the policemen who sued their employers in that case gave two reasons for his refusal. First, he said there would be a definitional problem if one was to recognise them as rescuers: who else would fit into the definition of rescuer? This is hardly a compelling reason for refusing recovery, and Lord Hoffman himself acknowledged this as a 'less important reason' [at 510]. The law is continuously concerned with definitional problems and it can hardly be advanced as a reason for not doing justice. The second and more compelling reason he advanced for not treating policemen as rescuers and allowing them to recover, was that to do so would be unfair and would offend against the 'notions of distributive justice'. '[The ordinary person] 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' [at 510]. This of course raised fundamental questions as to the purpose of the tort system in general, but in the present context it should be noted that such a distinction is not deemed offensive or objectionable *per se*, in our jurisdiction, where the Garda Compensation Scheme accepts that gardaí injured in the course of duty will get full compensation, whereas the ordinary citizen gets no general damages for pain and suffering for criminally inflicted injuries. Perhaps the Irish courts would see nothing wrong with allowing such policemen as were involved in *White* recovery either as employees or rescuers and the policy reason

given by Lord Hoffman for refusing compensation would not appear to have the same force in Ireland in any event.'

62. I share Judge McMahon's misgivings about the validity of Lord Hoffman's reasoning, both in general and more specifically in an Irish context. I am not persuaded by Lord Hoffman's invocation of Aristotle's *Nichomachean Ethics* as justification for the result arrived at in *White*. As explained in Freeman, *Lloyd's Introduction to Jurisprudence* (9th ed, 2014) (at para. 6-008):

> 'It is in discussions about the rationale of tort law that we see corrective justice most clearly. Theories of distributive justice do not address the goals of tort law adequately. Courts do not use the law of tort to correct distributive imbalances, though they may sometimes appeal to considerations of distributive justice to fortify conclusions reached by other routes. Even if they wanted to do so, they would find distributive considerations inappropriate where the interests protected were persons' lives or bodies.'

63. If tort law were intended as an instrument of distributive justice, however imperfect, it would not permit the existence of a control device such as the duty of care. Moreover, its application as an instrument to that end would more obviously require the modification or abolition of the *Alcock* control mechanisms than the adoption in *White* of a further separate control mechanism in cases of psychiatric injury caused to rescuers. It may be that Judge McMahon had considerations of this sort in mind in observing that Lord Hoffman's analysis raises fundamental questions about the purpose of the tort system in general.

64. Once again, I leave the last word on this point to the authors of *Charlesworth & Percy on Negligence*, already cited (at para. 2-165):

> 'A "danger" requirement seems appropriate if a rescuer is seeking to recover for psychiatric injury suffered as a result of fear for his or her own safety. But if the injury is caused by fear for and perception of physical suffering by others it does indeed seem arbitrary, its sole purpose being to limit the ambit of liability. A preferable approach might have been to move away from a rigid need to classify all claimants as "primary" or "secondary", but to identify deserving categories for recovery independently of that division. Claims by rescuers, as one such category, could be considered on their particular merits. This would be consistent with the kind of approach favoured by the Law Commission [*Liability for Psychiatric Illness*, Report No. 249, 1998].'

65. Thus, were it necessary to do so, I would reject the argument that, for Ms Sheehan to succeed in her claim as a rescuer, there is a threshold requirement that she objectively exposed herself to danger or reasonably believed that she was doing so, or – differently put – that it is necessary for her to establish that she came within the range of foreseeable physical injury in giving assistance at the scene of the accident. But it is not necessary for me to decide the point in the circumstances of the present case because, as

I have already indicated, I am satisfied that Ms Sheehan did expose 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. As Douglas Brown J accepted in *Cullin v London Fire & Civil Defence Authority* (1999) PIQR 314, in most instances the danger to a rescuer will not be the same as the one that caused the accident or disaster that precipitated the rescue.

The second argument

66. The defendants' second argument is that Ms Sheehan's claim must fail because, as a matter of policy, there is no liability in negligence where the primary victim was the negligent defendant and the shock to the plaintiff arose from witnessing the defendant's self-inflicted injury.

67. That was the conclusion reached by Cazalet J in the High Court of England and Wales in *Greatorex v Greatorex* [2000] 1 WLR 1970. The facts of that case were as follows. After an evening spent drinking, the defendant and a friend set off in the friend's car with the defendant driving. While overtaking on a blind bend, the defendant crossed on to the wrong side of the road and the car collided with an oncoming vehicle. The defendant was badly injured and trapped in the car. The plaintiff, who was the defendant's father, was called to the scene as a fire officer, where he attended to his son. He later developed long-term, severe PTSD as a result of those events. The defendant, his son, was subsequently convicted of various road traffic offences, including driving without due care and attention, and failing to provide a specimen.

68. Cazalet J accepted the argument that, not to exclude liability for psychiatric injury caused to a plaintiff who witnesses a defendant's self-inflicted physical injury, is to impose, in effect, a duty upon individuals to look after themselves, thereby placing an undesirably restrictive burden on the right to self-determination.

69. I have come to the conclusion that the decision in *Greatorex*, however persuasive it may be in its own terms, is of no assistance in this case for four reasons: first, because it is based on principles that our law does not recognise; second, because, it relies in significant part on authority that – to put it no further - has since been doubted; third, because it relies on a policy consideration that cannot apply on the facts of this case; and fourth, because – if accepted – the principle it represents would be capable of working unfairness and injustice incompatible with the fundamental norms of our legal system.

70. In the first part of his judgment in *Greatorex*, Cazalet J summarised the principles on liability for psychiatric injury to rescuers that were developed by the House of Lords in *Alcock, Page* and *Frost/White*, before concluding that, since there was no danger to the plaintiff in attending at the scene, his claim based on his position as a rescuer must fail. As I have already explained, I do not accept that, as a matter of law, those principles apply in Ireland. Even if they did, the position in this case would be different because Ms Sheehan did expose herself to danger in assisting at the scene of the crash or, differently put, did come within the range of foreseeable physical injury in doing so.

71. In addressing the issue of the extent of the duty owed to others by the victim of a self-inflicted injury, Cazalet J placed significant reliance on an *obiter dictum* of Deane J in the High Court of Australia in *Jaensch v Coffey* (1984) 155 CLR 549 (at 609), to which approving reference had been made by both Lord Ackner and Lord Oliver in *Alcock*, and which appeared to be based, in turn, on an old *dictum* of Lord Robertson in the Scottish case of *Bourhill v Young's Executor* 1941 S.C. 395 (at 399). Cazalet J also noted that the relevant statement had been followed by Vasta J in Queensland and Zeeman J in Tasmania, in *Harrison v State Government Insurance Office* (1985) Aust. Torts Reports 80-723 and *Klug v Motor Accident Insurance Board* (1991) Aust. Torts Reports 81-134, respectively.

72. However, there is a compelling argument that Lord Robertson's dictum was taken out of context; see Butler, 'Psychiatric Injury Resulting from a Tortfeasor's Death, Injury or Peril: Debunking an Unfortunate Dictum' (1996) 26 Queensland Law Society Journal 557. Moreover, in *FAI General Insurance Co. Ltd v Lucre* [2000] NSCWA 346 (November 29, 2000), the New South Wales Court of Appeal refused to accept that the common law was as Deane J had suggested, relying on the decision of the South Australian Full Court in *Shipard v Motor Accidents Commission* (1997) 70 S.A.S.R. 240, certain reservations expressed by Zeeman J in *Klug*, and the further doubts of Green CJ in *Churchill v Motor Accidents Insurance Board* (unrep., Supreme Court of Tasmania, December 2, 1993), before rejecting the argument that the duty of care is negated simply because the primary victim is the defendant or a deceased person being represented by the defendant.

73. These developments can be found summarised in Handford, 'Psychiatric damage where the defendant is the immediate victim' (2001) 117 LQR 397. Although it is unnecessary that I should express any concluded view on the question for the purpose of the present judgment, it seems fair to say that there is, at the very least, significant doubt about the extent to which the decision in *Greatorex* is solidly grounded in the common law.

74. In the absence of binding authority on the duty of care owed to others by a victim of self-inflicted injury, Cazalet J turned to policy considerations (at 1983). Given that the plaintiff and defendant in *Greatorex* were father and son and that, under the *Alcock* control mechanisms applicable to secondary victims generally, it was necessary for all such plaintiffs to establish, amongst other things, a close tie of love and affection with the person injured, Cazalet J concluded that '[t]o 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 relevant fault between its members' (at 1985). I have already concluded that the primary/secondary victim distinction and the *Alcock* control mechanisms have no role to play in the application of the relevant tests under *Kelly* and *Glencar*. Thus, the relevant policy consideration does not arise here as a matter of law. Nor does it arise here as a matter of fact, since Ms Sheehan and the deceased driver were strangers. And even if it did arise, litigation within the family is not uncommon, much less considered contrary to public policy, in this jurisdiction where a plaintiff has suffered

physical injury in consequence of the negligence of another family member who is insured.

75. In its report on *Liability for Psychiatric Illness* (Law Com. No. 249 (1998)), the Law Commission for England and Wales considered the issue of recovery where the defendant is the immediate victim, noting the self-determination argument later accepted by Cazalet J, but balancing it with the conflicting view that persons who deliberately or negligently place themselves in danger should foresee the possibility of the consequences of their actions for others and take responsibility for them, which is the position where a person negligently or deliberately injures or endangers himself, causing reasonably foreseeable *physical* injury to another (at para. 5.35).

76. The England and Wales Law Commission recommended that, to the extent that the *dicta* of Deane J in *Jaensch* and of Lord Robertson in *Bourhill* represented good law in England and Wales, as Lord Oliver in *Alcock* suggested they did, then any such bar to recovery by a plaintiff should be statutorily removed, subject to a discretion vested in the courts not to impose a duty of care if satisfied (most obviously in cases of injury or death caused by voluntary participation in dangerous sports or the deliberate infliction of self-harm) that it would not be just or reasonable to do so because the defendant had chosen to cause his own death, injury or imperilment. This was seen to represent the appropriate balance between the right to recover damages where there has been a breach of the duty of care and the individual's right to self-determination. It seems to me that, even if it were otherwise appropriate to apply an exclusion of liability of the type identified in *Greatorex* (and I have already concluded that it is not), then the constitutional strictures under which our courts necessarily and properly operate would only permit that to occur as the result of the relevant rights-balancing exercise, rather than as the result of the application of an inflexible, one-sided rule.

77. Thus, I reject the argument that the duty of care to Ms Sheehan in this case is negated simply because the primary victim, whose self-inflected injuries caused the shock that led to Ms Sheehan's psychiatric injury, is a deceased person represented by one of the defendants.

Conclusion

78. I find that the deceased driver in this case, represented by FBD, did owe Ms Sheehan a duty of care not to cause her a reasonably foreseeable injury in the form of psychiatric illness. I can identify no consideration of public policy that dictates otherwise. Further, I conclude that it is just and reasonable that the law should impose that duty on FBD for the benefit of Ms Sheehan. There is no dispute that Ms Sheehan's satisfies each of the other elements of the test to establish the defendants' liability to her in negligence. Thus, it follows that Ms Sheehan is entitled to recover damages from FBD to compensate her for the psychiatric injury she has sustained

79. I must assess general damages in an amount that provides reasonable compensation for the pain and suffering that Ms Sheehan has endured and will likely endure in the future;

Nolan v Wirenski [2016] 1 I.R. 461 (at 470). Further, as Irvine J explained in that case (at 471):

> 'Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries.'

80. Because of her experience on 28 January 2017, Ms Sheehan developed a moderately severe post-traumatic stress disorder ('PTSD'), consequent upon an acute stress reaction. She was out of work for an initial period of five weeks and, intermittently, for short periods thereafter, before leaving her job as a hairdresser in February 2019 on the basis that she felt unable to continue. Her condition has placed great strain on her family relationships, including her intimate relationship with her husband. She continues to undergo therapy and counselling, and to take a range of medications. When assessed in September 2019, she had still not yet recovered and the prognosis remained guarded. Her own consultant psychiatrist is hopeful that, in time, she will make a full recovery, subject to a twenty-five percent chance of further anxiety, depression or stress-related conditions in the future.

81. I assess Ms Sheehan's general damages in the sum of €65,000 to date and €20,000 into the future, making a total of €85,000. Special damages are agreed in the sum of €2,238. The total award is, therefore, €87,238.