OUTER HOUSE, COURT OF SESSION

OPINION OF J GORDON REID, Q.C., F.C.I.Arb

(Sitting as a Temporary Judge)

in the cause

MAURICE ANDREW SALTER (A.P.)

A 1968/01

Pursuer;

against

UB FROZEN & CHILLED FOODS LIMITED

Defender:

Act: Ivey, Q.C., Guinnane; Lindsays

Alt: Stephenson; The Anderson Partnership

25 July 2003

Introduction

[1]In this action which came before me on Procedure Roll on 12 and 13 June 2003, the pursuer seeks damages from his employers for psychiatric injury arising out of an accident at work in which he was involved and in which, through no fault on his part, a fellow employee died. Two main issues arose for discussion, the first was whether the pursuer's claim was relevant in law, the second related to time bar.

Factual Background

[2]The pursuer's averments are assumed to be true for the purposes of the legal debate. In summary, he avers that on 8 June 1990, he was operating a forklift truck. Two fellow employees (Palmer and Hare) were stocktaking, they were checking goods stored on rows of pallets in the cold store area of the defenders' factory, the pallets were piled up high close to the roof beams of the factory building. The stocktakers were lifted in a cage mounted on the forks of the forklift truck which moved along beside the rows of pallets. When they reached the highest level of pallets the stocktakers had to duck from time to time to avoid contact with the roof beams. At this level the pursuer could not see the stocktakers, who gave shouted instructions to him. At one point, the forklift truck shuddered and the orange helmet of one of the stocktakers fell to the ground. The other stocktaker told the pursuer to get out quickly. The pursuer reversed the forklift and lowered the cage. As he did so, he saw blood dripping on to the factory floor from the cage. As the cage came down the pursuer could see blood coming from the ears nose and mouth of one of the stocktakers (Palmer) who was fatally injured. When the forklift had moved forward Palmer had struck head against a cross member at the top of the racking on which the pallets were stacked.

[3]The pursuer became hysterical. He was consoled and then informed that the stocktaker had died. The pursuer broke down and was taken home. He was deeply shocked. His GP called at his home that evening. He was given an injection to calm him down. The pursuer blamed himself for the accident. He left home for a few days. He attempted to "blank out" the events of the accident and went into denial. He returned to work on 25 June 1990 on the basis that he would not work in the cold store. The defenders agreed. The pursuer suffered from nightmares and flashbacks. He thought this was simply something that happened after

witnessing an accident and did not seek any further medical help at that time. He drank heavily, and became irritable and bad tempered. His marriage was under stress. He eventually curbed his drinking habits and thought that he had recovered from the events of June 1990. In October 1995, he was persuaded to work in the cold store again as a driver. He was sent on a refresher driving course. His job in the cold store was made permanent. On the first night after this job became permanent he shook uncontrollably. He suffered nightmares and sleeplessness. In February 1996, he had a nervous breakdown at work. He attempted to commit suicide and contemplated suicide on other occasions. Since February 1996, he has been unable to return to work and has received treatment from his General Practitioner, a Psychological Counsellor, a consultant psychiatrist, and a clinical psychologist. In about November 1996, the pursuer was admitted for treatment to Crichton Royal Hospital, Dumfries. All the symptoms the pursuer suffered were ultimately identified as symptoms and effects of PTSD and depression. The pursuer does not aver that he suffered physical injuries. Nor does he aver that he was at risk of suffering any such injuries (I reject below, a submission to the contrary), or that there was a close relationship between him and the deceased stocktaker. It was assumed by counsel that, for the purposes of the Procedure Roll discussion, the pursuer's averments may amount to psychiatric injury.

[4]The pursuer further avers that he was unaware that the injuries from which he was suffering were sufficiently serious to justify his bringing an action of damages until after his nervous breakdown in February 1996. He considered himself to blame for the accident. He was not aware that he had any cause of action until a friend advised him to consult a solicitor, which he did, in about May 1996 with a view, initially, to seeking redress for redeployment in the cold store in October 1995, but did not qualify for Legal Aid. He consulted solicitors again in September 1996. Investigations were made. The summons was served on 31 January 1997, over six years after the accident. The pursuer contends that the action is not time barred in terms of section 17(2) of the Prescription and Limitation (Scotland) Act 1973. He further avers that, even if it is time barred, it is equitable that the Court allow him to pursue the action in terms of section 19A of the 1973 Act.

[5]The pursuer also avers that the defenders have pled guilty to a contravention of sections 2(1) and 33(1)(a) of the Health & Safety at Work Act 1974 and have settled claims by the widow and family of the deceased stocktaker. He avers that various duties were owed to him by the defenders, including various measures that would have prevented the accident, all on the basis that the defenders knew or ought to have known that (i) there was a risk of serious or fatal injury to stocktakers, (ii) the pursuer would be present if any such injury occurred and would be aware of and see the injuries sustained, (iii) there was a risk that the pursuer would blame himself, and (iv) there was therefore a risk that the pursuer would suffer shock and mental injury.

Submissions

(a) Relevancy

[6]In a detailed and helpful submission, Mr Stephenson advanced three propositions. First, he submitted that in a *nervous shock* case caused by witnessing the death of another, damages are only recoverable if (a) the pursuer was at risk of physical injury or reasonably believed he was at risk; or (b) the pursuer fulfils the secondary control mechanisms in *Alcock* v *Chief Constable of South Yorkshire* 1992 AC 310 as developed in *Page* v *Smith 1996* 1 AC 155 and *White* v *Chief Constable of South Yorkshire* 1999 2 AC 455 *(*known as *Frost*). Secondly, he submitted that the fact that the pursuer was involved in the operation which caused the death or believed himself to be responsible for the death does not assist the pursuer as neither falls within either branch of the first proposition. Thirdly, as the pursuer does not bring himself within (a) or (b) he cannot recover damages and the action should be dismissed as irrelevant.

[7]He developed these submissions by analysing the various authorities. He began with *Dooley* v *Cammell Laird & Co Ltd & Anr* 1951 1 Lloyd's Rep. 271, referred to in *Alcock* and submitted that this case, which was similar to the facts of the present case, had been subsequently misunderstood. In *Dooley* there was no suggestion that the plaintiff blamed himself for the accident. In a nervous shock case it was necessary to

determine whether the pursuer was a primary or secondary victim. In *Alcock,* Lords Jauncey and Oliver treated as a primary victim someone who believed he had been the cause of the accident, and a person who had come to the rescue and been put in a state of distress. All others were secondary victims who required to pass the special ties of love and affection control mechanism. If the law had not changed since *Alcock*, the pursuer would have a relevant case for proof. Reference was then made to *Page* to show the varying views taken by their Lordships in the House of Lords. The plaintiff succeeded in *Page* because it was sufficient that physical injury was foreseeable. *Frost,* like *Alcock* concerned the Hillsborough disaster but the plaintiffs were police officers rather than relatives. *Alcock* was refined. To qualify as a primary victim the pursuer must aver and prove that he was or reasonably believed he was at risk of physical injury. The pursuer in this action makes no such averments and must therefore be a secondary victim, who cannot comply with the applicable control mechanisms. Mr Stephenson then referred to *W and Ors* v *Essex* CC 2001 2 AC 592 where foster parents claimed damages arising out of the sexual abuse of their children by a teenager they agreed to foster, having stipulated that they would not accept him if he had abused children in the past, which unknown to them, he had. This case could be distinguished on the base that the stipulation gave the case a contractual flavour. In *Robertson* v *Forth Road Bridge Joint Board* 1996 SLT 263, a fellow employee of the pursuer's fell from the bridge to his death. The pursuer's claim failed because he was a bystander who had no close ties of love and affection with the deceased. Reference was made to a passage at page 268H, which appeared to support the present claim. Any *dicta* in *Robertson* favourable to the pursuer were superseded by *Page* and *Frost.* It was submitted that in *Campbell* v *North Lanarkshire Council* 2000 SCLR 373, in allowing a proof before answer, the Court had mixed up the categories of primary and secondary victims. There was however, no suggestion that the scope of primary victims was to be expanded. The most recent Scottish case was *Keen* v *Tayside Contracts* 2003 SLT 500, which is the subject of a Reclaiming Motion. There the pursuer, a road worker, instructed to attend at the scene of a road traffic accident to assist in the removal of crushed and burned bodies, sued his employers for nervous shock. The action was dismissed. It was argued that the Court's categorisation of the classes of victims was wrong. He also referred briefly to *Bourhill* v *Young* 1942 SC (HL) 78 which he said was decided on the basis of foreseeability.

[8]Mr Ivey, in an equally helpful submission, argued that *Page* did not hold that it was necessary for a pursuer to be within the ambit of foreseeable injury. *Frost* did not lay down a rule that a pursuer who cannot place himself within the range of foreseeable physical injury must be a secondary victim who requires to satisfy the *Alcock* controls before he can recover damages for psychiatric injury. If it did, the present case was an exception or the decision was now questionable in the light of *W* v *Essex CC*. He accepted that if the pursuer was a secondary victim then he must satisfy the *Alcock* controls. Here, the pursuer makes no attempt to do so and the question is whether he is a primary victim. *Frost* left cases such as the present open. Historical guidance does not exclude the pursuer establishing foreseeability, proximity and the fairness, justness and reasonableness in imposing the duties averred.

[9]Mr Ivey developed these submissions by reference to various passages in *Frost.* He submitted that Lord Hoffman's view was not the same as Lord Steyn's yet Lord Browne Wilkinson agreed with both. *Frost* established that employment by the defender was not enough; nor was the fact that a pursuer was a rescuer sufficient unless he was within the range of foreseeable physical injury. *Walker* v *Northumberland* CC 1995 1 AER 737, where the plaintiff suffered a nervous breakdown due to the pressures and stress of work, was, he submitted, decided on foreseeability. The plaintiff, who successfully sued his employers, was a *Page* type victim. In *Dooley* the plaintiff was the instrument of injury. Similarly here, the pursuer was the instrument of injury, and blamed himself. In *Young* v *Charles Church (Southern) Ltd & Anr* 1997 39 BMLR 146, one of the plaintiff's fellow scaffolders was electrocuted after the plaintiff passed to him a piece of scaffold which the deceased allowed to touch an overhanging cable. The plaintiff suffered nervous shock and successfully sued his employers; it was held that he was a primary victim, having participated in the events which occurred and having been directly involved in the accident. There was no difference between *Dooley* and the present case except that *Dooley* did not have feelings of guilt. As a fall back, Mr Ivey submitted that the pursuer's averments did point to him being within the area of foreseeable injury. The averments were sufficient to pass the *Caparo* tests of fairness, justness and reasonableness. There should therefore be a proof before answer on liability.

(b) Time Bar

[10]Mr Stephenson submitted that as the accident occurred on 8/6/90, and the summons was served on 31/1/97, the action was *prima facie* time barred, and the pursuer therefore had to make a case under section 17(2)(b) of the 1973 Act and/or section 19A. The pursuer had failed to make the necessary averments of constructive knowledge of the facts specified in section 17(2)(b) namely (i) that the injuries were sufficiently serious to justify proceedings, (ii) that they were attributable to an act or omission, and (iii) that the defender was a person to whose act the injuries were attributable. He also drew my attention to section 22(3). He referred to *Agnew* v *Scott Lithgow Ltd* 2001 SC 516 paragraphs 10 and 14, *Carnegie* v *LA 2001* SC 802 and submitted that there was no difference for present purposes between physical and psychiatric injury. He sought to exclude from probation the following words in article 5 of the condescendence page 16E-F:- *the present cause of action is not time barred in terms of section 17(2) of the Prescription & Limitation (Scotland) Act 1973. Esto the pursuer's claim is time barred then* which would have the effect of excluding the pursuer's case based on section 17(2). If this part of the pursuer's case were allowed to go to proof, Mr Stephenson did not seek a preliminary proof on time bar.

[11]Mr Ivey accepted that averments of constructive knowledge had to be made or had to be capable of being inferred from the pleadings. *Agnew* and other cases on this topic related to physical injury. Psychiatric injury was different in this context especially as only certain symptoms were actionable no matter how debilitating other symptoms such as grief or feelings of guilt might be. The pursuer's averments were made on the basis of a retrospective diagnosis; it could not be said he ought to have known of his injuries until at least February 1996. In any event no conclusions should be reached until evidence is led. If I were against him, he invited me to put the case out By Order to enable him to consider seeking leave to amend.

Decision

(a) Psychiatric Injury

[12]The pursuer avers that he was involved or a participant in an accident at work which led to a fellow employee's death and to his, the pursuer's, psychiatric injury which has given rise to his action for damages. However, he makes no averment that he was at any stage exposed to foreseeable risk of physical injury. I reject Mr Ivey's submission that it can be inferred from the pleadings that he was. As matters presently stand, I do not see how the pursuer could competently lead evidence showing how he was exposed to danger when operating his forklift truck on the occasion in question.

[13]Before considering the authorities cited I note that the assumed facts in the present case are very similar to the facts in *Dooley.* There, a crane driver, employed by Cammell Laird at their shipbuilding yard suffered nervous shock when a rope or snotter connecting a container or sling to the crane hooks snapped causing the load to fall into the hold of a ship in which men were working. He sued his employers on the basis that the sling was either overloaded or defective in breach of shipbuilding regulations and the common law duties to provide safe plant and a safe system. The second defendants, Mersey Insulation, who were carrying out insulation work on the ship's hold, and to whom the travelling crane was loaned were sued on the basis that the sling was their property and they negligently caused it to be overloaded or to be used without inspection. Issues of foreseeability and proximity were raised in the defences (page 273 col 1). The plaintiff knew that there were people working in the hold (274 col 1). When the snotter broke and the load fell into the hold, the plaintiff could not tell if the load struck anything but he felt wretched. In the event no one was injured. However, the plaintiff suffered nervous shock and was permanently incapacitated from further employment as a crane driver. Donovan J found Cammell Laird to have been in breach of the regulations noting that one of them was made as a protection against the risk of bodily injury which included injury to the nerves, the nerves being a part of the body (275 col. 2). In reviewing the case against Mersey Insulation, Donovan J considered whether they ought reasonably to have expected that Dooley would be affected by the consequences of a breaking rope (276 col. 1). Mersey Insulation denied the existence of any duty and argued that the duty to take care to avoid inflicting nervous shock is owed only to a person who may suffer nervous

shock through some physical impact upon himself, his wife or child, or through reasonable fear of such impact. Donovan J relied on *Bourhill* and pointed out that the fact that the pursuer's terror did not involve any element of danger was not decisive (276 col. 2). He approached the issue of liability by reference to foreseeability, concluding that if the driver of a crane feared that the load may have fallen upon some fellow workman and the fear is not baseless or extravagant, then it is a consequence reasonably to have been foreseen that he may himself suffer a nervous shock (277 col. 2). He therefore found that Mersey owed the plaintiff a duty to use a sound rope for the purposes of the hoisting. There is no suggestion at any point in the report that the plaintiff was at risk of physical injury or considered himself to be at risk. Nor is there any suggestion that Mr Dooley blamed himself for what happened. In the present proceedings, the facts are similar and perhaps stronger for the pursuer. He, too, was actively involved in the accident caused he says by his employer's fault. A fellow employee was fatally injured. It was these consequences which the pursuer says have led to his psychiatric injury. If *Dooley* is correctly decided then it cannot be said that the pursuer's claim is irrelevant. Is *Dooley* no longer good law? Has it been overruled expressly or by implication by subsequent authority?

[14]The law relating to damages for psychiatric injury has been extensively reviewed in England in recent years and to a lesser extent in Scotland. In Scotland, the starting point is perhaps *Bourhill* v *Young.* The pursuer there was a bystander, outwith the area of foreseeable physical injury, who heard the crash, at close quarters, of a road accident in which a motor cyclist, whom she did not know, was killed. Her claim failed and was decided essentially by reference to foreseeability. In more modern times, *Alcock,* arising from the Hillsborough football stadium disaster (where 95 people died and over 400 were injured as a result of overcrowding), is regarded as a watershed. Several of the plaintiffs were present in other parts of the ground; others witnessed the tragic events live on television or in a recorded broadcast and/or were informed by relatives or police; a number identified their relatives in a temporary mortuary later in the night or the following day. The claims were for psychiatric injury arising from the death or injury of friends or relatives crushed in pens below the west stand where excessive numbers had been allowed in by the police. None of the plaintiffs was involved in or a participant in the event which led to the claims. Lords Keith of Kinkel and Ackner did not discuss such claims. They based their views on foreseeability, and proximity including certain policy factors namely, the class of persons whose claims should be recognised, the proximity of such persons to the accident and the means by which the psychiatric injury is caused (396H, 397C-D,F, 398B; and 402B, 403F-G, 404H, 405A-B,F). Lord Oliver of Aylmerton observed that cases in which damages are claimed for injuries caused by a direct assault upon the mind or the nervous system *present no very difficult problems of analysis where the plaintiff has himself been directly involved in the accident from which the injury is said to arise. In such a case he can properly be said to be the primary victim of the defendant's negligence and the fact that the injury which he sustains is inflicted through the medium of an assault on the nerves or senses does not serve to differentiate the case, except possibly in the degree of evidentiary difficulty, from a case of direct physical injury* (407B-C). He then discusses the cases in which the plaintiff was involved either mediately or immediately as a participant. He places in the same category as those who have been *personally involved* as an *actor* (408H) in the incident either through the direct threat of bodily injury to themselves or in coming to the aid of others injured or threatened, the category of plaintiffs where *the negligent act of the defendant has put the plaintiff of being in the position of being, or of thinking that he is or 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. The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable* (408F-G). He cites *Dooley, Galt* v *BRB* 1983 133 NLJ 870 and *Wigg* v *BRB Times* 4/2/86 as illustrations of this category. He does not, in terms, state that a necessary ingredient of the *Dooley* line of cases is a feeling of guilt or self-blame. If the last sentence in the passage just quoted is explanatory and a summary of his analysis, as I believe it is, then self blame is clearly not a necessary ingredient. He then analyses the claim before him by reference to the principle of foreseeability and the concept of proximity which he described as 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 analogical deduction (411B & E). In relation to the instant claims, he too relied upon foreseeability and proximity (415D-E, 416E-417A).

[15]Lord Jauncey of Tullichettle also founded his analysis upon foreseeability and proximity (419F, 420B. He refers to *Dooley* as a case where the plaintiff's nervous shock arose from his fear that his fellow workers would be injured. He described the case as a special one because the plaintiff was *operating the crane and was therefore intimately involved in, albeit in no way responsible for, the accident* (420F). He notes that Donovan J (the trial judge) treated the matter simply as one of reasonable foreseeabilty (420F) and concluded that *the defendants could readily have foreseen that Mr Dooley would be horrified and shocked by the failure of the rope and the consequent accident which he had no power to prevent* (420G). Lord Jauncey then proceeded to adopt and apply dicta of Lord Wilberforce in *McGloughlin* v *O'Brian* 1983 1AC 310. Lord Lowry concurred.

[16]All the plaintiffs in *Alcock* failed because they failed to overcome the control mechanisms laid down, which, in summary, are that (i) the plaintiff must have had close ties of love and affection with the victim, (ii) the plaintiff must have been present at the accident or at its immediate aftermath, and (iii) 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. Only Lords Oliver and Jauncey discussed the type of claim I have to adjudicate upon. Both cited *Dooley* with apparent approval. Lord Oliver of Aylmerton classified the plaintiff in *Dooley* as a primary victim.

[17]In *Page v Smith*, the plaintiff suffered injury, namely nervous shock but no physical injury in a collision while driving his motor car. The issue was whether he was required to prove that it was reasonably foreseeable that he would suffer nervous shock capable of leading to some identifiable psychiatric illness. The majority held that, once it was established that the defendant was under a duty of care to avoid causing personal injury to the plaintiff, it mattered not whether the injury in fact sustained was physical, psychiatric or both. There was much discussion, particularly in the speech of Lord Lloyd of Berwick, about primary and secondary victims, but no detailed discussion about the scope of what is meant by primary victim. *Dooley* for example, was not discussed at all in the House of Lords.

[18]In *Frost,* the House of Lords returned to the Hillsborough disaster and claims for psychiatric injury. This time, the plaintiffs were police officers on duty at the time. Some were present within the stadium. One was responsible for stripping bodies and completing casualty forms at the nearby hospital. All the claims before the House of Lords failed either because there was no duty to protect the plaintiffs from psychiatric injury, where there was no breach of duty to protect them from physical injury, or because there was no duty to protect a rescuer in relation to whom physical injury was not reasonably foreseeable and not reasonably apprehended. Lord Griffiths, who dissented in part, described primary victims as *victims who are imperilled or reasonably believe themselves to be imperilled by the defendant's negligence* (463G-H). He described secondary victims as bystanders (ibid). He considered that the control mechanisms in *Alcock* should apply to *all those not directly imperilled or who reasonably believe themselves to be imperilled irrespective of whether they are employees or not* (464F-G).

[19]Lord Goff of Chieveley, in a dissenting speech, noted that Lord Oliver did not attempt to define primary victims; and observed that into this category fall *a number of widely differing cases in which recovery is allowed* (472G-H). He analysed and criticised Lord Lloyd's speech in *Page.* He notes that Lord Oliver in *Alcock* regarded the principle of foreseeability of psychiatric damage as applicable in cases concerned with participants as in the case of secondary victims (475D). He considered that Lord Lloyd did not conclude that *presence within the range of foreseeable physical injury is a necessary attribute of a primary victim* (478F-G; 486 D-E). He drew support for this from *inter alia Dooley* which Lord Oliver referred to in *Alcock* (479B-C&G), a passage invoked by Lord Lloyd in *Page.* He notes in the authorities relating to the recovery by an employee from his employer of damages for psychiatric injury arising from the death or physical injury of another *a distinction being drawn between those cases in which the employee has in the course of his employment been involved in the event which resulted in the other's physical injury or death..... and other*

cases in which he has, while at work, incidentally witnessed that event and its outcome (481E-F). He observes that in *Dooley* the plaintiff was never in any personal danger (487A). Lord Goff would have allowed the police officers' claims (subject to questions of causation) on the basis that psychiatric injury was a consequence of their involvement which was reasonably foreseeable by their employer who was responsible for their safety at work (490H). Lord Steyn did not discuss the *Dooley* line of cases. Although he mentions the *Dooley* line of cases, Lord Hoffman does not discuss *Dooley* in detail, confining himself to the view that there might be grounds for *treating such a rare category of case as exceptional and exempt from the Alcock control mechanisms* (508A).

[20]*Robertson* v *Forth Road Bridge Joint Board* was a *bystander* case decided after *Alcock* but before *Page* and *Frost.* The pursuer was not exposed to the risk of death or serious physical injury (265D-E). He was within the ambit of the duty of care owed by his employer to the fellow employee who was killed (266L). Lord President Hope adopts Lord Oliver's classification of *Dooley Galt* and *Wigg.* In a later passage, Lord President Hope states that feature common to all these cases is the *involuntary cause of another's death or injury* (268H, and Lord Oliver in *Alcock* at 408F). What mattered was that it was the pursuer's own hand or act which was the cause or supposed cause; this essential characteristic distinguished the category from the bystander. He later describes the category as cases of *active participation* (269H). Lord Allanbridge considered that Lord Oliver *was indicating that in cases of accidents at work it was only where a workman was placed in a position where he has reason to consider at the time of it that he himself was the involuntary cause of it so that he suffered from such anxiety and guilt about it as to sustain this trauma, that his employers could be liable in damages for his psychiatric illness caused as a result of witnessing the accident* (271E-F). *Robertson* failed, on the facts, to establish that he was more than a mere bystander (266D, J; 271F-G).

[21]In my opinion, some care must taken when using the phrase *involuntary cause* and *participant* because they may not be the same. *Involuntary cause* connotes feelings of responsibility or guilt which may lead to psychiatric injury. This raises an issue of causation rather than the existence and scope of a duty of care. In *Dooley*, the accident, in which no one suffered physical injury, was caused by the faulty rope or the overloading of the sling, neither of which was the plaintiff's responsibility. He was not the involuntary cause of the accident but was most certainly an active participant and the instrument of any injury which might have ensued. This was held to be enough to establish the duty not to cause psychiatric injury. In *Frost* Lord Goff considered *Robertson* in some detail (1999 2 AC 455 at 482C-483B). He used the phrase *active participation in the event* (482H). He concludes his analysis of *Robertson* by observing that *It was perhaps open to the Lord President to take the view that the two pursuers were at the time actively involved with (the deceased) in the operation of removing the sheet from the bridge, in which event the (pursuers') reclaiming motion would no doubt have been granted; but he took a different view of the facts of the case.* This suggests that Lord Goff considered that being the involuntary cause of the accident with associated feelings of guilt were not essential ingredients to establish the existence and scope of the duty of care, but that active participation was sufficient. It seems to me that, in relation to an accident at work, active participation in the accident is the critical ingredient. There may be subsequent feelings of guilt, but another party rather than the pursuer will always be the cause of the accident and the pursuer seeking damages for psychiatric injury will be blameless. The pursuers in *Robertson* did not appear to blame themselves for the accident. Lord Goff would have found in their favour if a finding-in-fact that they were active participants had been made. Feelings of guilt are unlikely to arise if the pursuer was not an active participant. Active participation is the necessary ingredient from which feelings of guilt may or may not flow. In any event, in the present case the pursuer avers that he *felt he was to blame for Palmer's death.*

[22]In *Young* v *Charles Church (Southern) Ltd*, the plaintiff who was involved in scaffold erection with two others handed his fellow employee a scaffold pole; his workmate touched an overhead cable with the pole and was electrocuted. The plaintiff heard a loud bang, saw flames and that his workmate had been killed. He ran for help and returned to the scene. He suffered psychiatric injury and sued the occupiers of the site and his employers who admitted liability for the accident which led to the death of the plaintiff's workmate. The Court of Appeal held that the plaintiff was a primary victim and as such was entitled to succeed as a

participant in the events which occurred and was directly involved in the accident. When this case was decided, *Frost* had been appealed to the House of Lords but had not been decided. The Court of Appeal held that the plaintiff was a primary victim of the defendants' admitted negligence because it was reasonably foreseeable that he might suffer physical injury with or without mental injury by reason of the defendants' failure to ensure that the scaffolding was not erected near live overhead electricity cables. The Court also considered that if the test of *participation or involvement in the accident* were adopted, the plaintiff would also come within that category (page 153 and 164).

[23]In *W & Ors* v *Essex* CC*,* the Council placed a teenage boy with the plaintiffs as foster parents upon the assurance that no sexual abuser would be placed with them; the boy subsequently sexually abused the plaintiffs' four children aged between eight and twelve years. The parents claimed damages for their own psychiatric injury suffered on discovering what had occurred. The House of Lords effectively allowed a proof before answer. The interest of the case for present purposes is its examination of primary and secondary victims. The defendants argued that feelings of guilt should not be elevated into a special class of claim under reference to *Dooley.* In the only reasoned speech, Lord Slynn of Hadley began by observing that *Where the law is not settled but in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts* (598C). This is entirely consistent with the approach in Scotland where claims of damages for alleged negligence are rarely finally disposed of on relevancy because the circumstances of each case normally have to be considered by evidence as the detail of the case on which an assessment of the law must depend often cannot be fully comprehended by the pleadings. This is recognised by recent procedural changes to pleading requirements in actions for damages for personal injuries.

[24]In Lord Slynn's opinion, the categorisation of those claiming to be included as primary or secondary victims is not finally closed (601A). Moreover, he was of the view that none of the cases cited to him conclusively showed that if the psychiatric injury suffered by the parents flowed from a feeling of responsibility, they were prevented from being primary victims (601D). It is beyond doubt that at least part of the field of liability for psychiatric injury in Scotland is still developing and on that ground alone, I should be slow to hold the pursuer's claim to be irrelevant.

[25]In similar vein, Lord Reed in *Campbell v North Lanarkshire Council* declined to dismiss an action as irrelevant in which the pursuer claimed damages from *inter alia* his employers for psychiatric injury where an accident occurred at work in a switch room where electrical equipment was being repaired; the pursuer was some 30-40 yards way from the switch room which he had just left, when the explosion occurred; he ran back while the explosion was still in progress and found some fellow employees badly injured. Lord Reed declined to decide on the pleadings whether the pursuer was a *rescuer* (383D-E). The defenders argued that, as the pursuer was not offering to prove that he was exposed to risk of injury, he could not therefore be a primary victim; the *Alcock* control mechanisms applied and the pursuer did not satisfy them. The pursuer argued that he participated in the accident or was a rescuer. Lord Reed exposed certain difficulties with the speech of Lord Lloyd of Berwick in *Page* and considered that the issue was whether he could decide on the pleadings whether the pursuer was or was not within the range of foreseeable physical injury (384A-B). Unless Lord Reed was rejecting the active participation argument, this suggests that an employee claiming damages for psychiatric injury through an accident at work in which he was an active participant must establish that he was within the range of foreseeable physical injury (384A). This view does not sit happily with *Dooley,* (mentioned but not discussed in any detail in *Campbell*) who was not within that range, Lord Oliver's treatment of the *Dooley* line of cases, Lord President Hope's analysis in *Robertson* where Robertson the driver was not at risk at all, the *obiter* views in *Young* referred to above, and Lord Goff's compelling analysis of what Lord Lloyd was truly saying in *Page* (see *Frost* at pages 477H-480F especially at 478F-G; 479D-F). If foreseeability of physical injury were a necessary ingredient where the employee was an active participant in the accident, then much of Lord President Hope's analysis in *Robertson* was nothing to the point. The result would be that foreseeability of physical injury justifies recovery for unforeseen psychiatric injury, even without actual physical injury, but recovery for foreseeable psychiatric injury is denied unless physical injury is also foreseeable. It would also mean that *Dooley* was wrongly decided, a view which has not been expressed in any of the authorities cited to me.

[26]In *Keen* v *Tayside Contracts* 2003 SLT 400, a road worker was instructed to attend the scene of a serious road accident. He became aware of the existence of a badly burned and crushed body and that there were four other bodies in one of the vehicles involved. He telephoned his supervisor and asked his supervisor to be allowed to leave the scene until the bodies had been removed as he had not had training for such a situation. The request was refused and he was instructed to remain and assist at the scene. As a result he developed psychiatric injury and sued his employers. In dismissing the action as irrelevant, Lady Paton noted that the claim was a classic case of nervous shock (509C), in which the pursuer did not contend that he was a rescuer or was exposed or thought he was exposed to personal danger. She held that the pursuer was a secondary victim to which the control mechanisms applied (para 58), and which could not be met. The facts in *Keen* are very different from the facts in the present case and the duties pled are somewhat special. I need not therefore consider it further.

[27]In my opinion, on the assumed facts, the pursuer is a primary victim because he was actively involved in the accident which led to the death of his fellow employee. He has averred (but did not need to for the purposes of establishing the existence and scope of the duties of care upon which he founds) that he blamed himself for the accident. He falls within the class of victims identified by Lord Oliver of Aylmerton in *Alcock* at 408F-G. He was an active participant in the accident and may through the medium of the fork lift have been the instrument of injury although blameless. It is not a necessary ingredient to establish the existence and scope of any duty on the part of his employers to take reasonable care to avoid causing him psychiatric injury that he either blamed himself for the accident or that he was within the range of foreseeable physical injury. He must establish that psychiatric injury was in the circumstances reasonably foreseeable. It is at the very least arguable that having regard to the authorities and in particular *Dooley* and the subsequent treatment of that case, psychiatric injury was, on the assumed facts, reasonably foreseeable. In these circumstances, it cannot be held at this stage that the psychiatric injury for which the pursuer seeks damages was unforeseeable. The action cannot therefore be dismissed as irrelevant on the basis of the arguments advanced by the defenders on this branch of the case.

(b) Time Bar.

[28]Mr Ivey accepted that the matters identified in section 17(2)(b) of the 1973 Act had to be the subject of averment either express or inferred from other facts and circumstances pled (see eg *Mackay* v *Lothian Health Board* 2001 SLT 581 at 584A). As Lord Johnston put it in *Carnegie* v *LA* (para. 14) one must be able to detect a date at which the pursuer *should have considered that the injuries of which he was aware were sufficiently serious to warrant him pursuing an action of damages.* According to the pursuer's averments, immediately following the accident he was absent from work for only two weeks. I have already summarised part of the averred history. In Article 5 of the Condescendence, the pursuer avers that he was not aware that his injuries were sufficiently serious to justify bringing an action until after his nervous breakdown in February 1996. On the advice of a friend he consulted a solicitor in May 1996, but did not qualify for Legal Aid. This, he avers, related to his redeployment in the cold store in 1995. He returned to his solicitor in September 1996 and following further investigations he was advised that he might have a ground of action relating to the 1990 accident. The action was raised in January 1997.

[29]In my opinion, the pursuer has made sufficient averments from which it can be inferred that it would not have been reasonably practicable for him to become aware until some point in 1996 that his injuries were sufficiently serious to justify his bringing an action of damages. I attach significance to the averment that (i) he thought his nightmares were *simply something that happened after witnessing an accident* (Article 4 page 12B), (ii) he erroneously considered that he had recovered from the effects of the events of 1990 (article 4 page 12D), (iii) his symptoms did not reappear until 1995 or 1996 (13B), and (iv) it was only after the obtaining of medical reports that advice that he might have a ground of action was confirmed by solicitors (article 5 page 13E). I also agree with Mr Ivey that psychiatric injury is somewhat different from physical injury. It is more subtle (*Bourhill* v *Young* 1942 SC(HL) 78 per Lord MacMillan at page 87). There is greater diagnostic uncertainty in psychiatric injury than in physical injury cases; the classification of emotional injury is often controversial (*Frost at 493G-H per Lord Steyn).* Some forms of psychiatric injury are not

actionable at all. Thus, the experience of having to cope with the deprivation consequent upon the death of a loved one; a spouse who suffers psychiatric illness caring for her seriously injured husband; the parent distraught by the conduct of a brain damaged child attract no damages (*Alcock at 400F-G per Lord Oliver).* Yet grief, constituting pathological grief disorder, may be recoverable (*see Frost at page 491H per Lord Goff).* Between 1990 and 1997 and beyond the state of medical knowledge and the law has been developing and continues to develop. I am therefore unable to hold that if the Pursuer proves all his averments, he is bound to fail to establish that it would not have been reasonably practicable for him in all the circumstances to become aware of all the matters specified in section 17(2)(b) of the 1973 Act before 1996. He is therefore entitled to establish his averments on the question of time bar at proof. Had I been against the pursuer, I would have acceded to Mr Ivey's request to put the case out By Order to enable the question of amendment to be considered. In my view, this is the obvious, sensible and just course to take, when pleading defects may be capable of being cured by amendment. Whether a party will be allowed to amend will depend upon the circumstances of each case.

Summary

(1)On the assumed facts, the pursuer is a primary victim because he was actively involved in the accident which led to the death of his fellow employee. He falls within the class of victims identified by Lord Oliver of Aylmerton in *Alcock* at 408F-G. He was an active participant in the accident although blameless.

(2)It is not a necessary ingredient to establish the existence and scope of any duty on the part of his employers to take reasonable care to avoid causing him psychiatric injury that he either blamed himself for the accident or that he was within the range of foreseeable physical injury. He must, however, establish that psychiatric injury was, in the circumstances, reasonably foreseeable.

(3)It is at the very least arguable that, having regard to the authorities and in particular *Dooley* and the subsequent treatment of that case, psychiatric injury was, on the assumed facts, reasonably foreseeable.

(4)In these circumstances, it cannot be held at this stage that the psychiatric injury for which the pursuer seeks damages was unforeseeable. The action cannot be dismissed as irrelevant.

(5)The pursuer has made sufficient averments from which it can be inferred that it would not have been reasonably practicable for him to become aware until some point in 1996 that his injuries were sufficiently serious to justify his bringing an action of damages.

Result

[30]I shall repel the defenders' second plea-in-law of consent as it was not insisted in and *quaod ultra,* allow a proof before answer, leaving all remaining pleas standing. All questions of expenses are meantime reserved.