OUTER HOUSE, COURT OF SESSION

OPINION OF LADY PATON

in the cause

RORY KEEN

Pursuer;

A4694/01

against

TAYSIDE CONTRACTS

Defenders:

Pursuer: A. W. D. McLean, Advocate; Allan McDougall & Co., S.S.C.

Defenders: Dewar, Q.C.; Simpson & Marwick, W.S.

26 February 2003

Post traumatic stress disorder: road worker obliged to remain at scene of road traffic accident

[1]In this action the pursuer sues his employers averring negligence. As a road worker, and foreman of a team of three road workers, he was on 15 September 1998 instructed by his supervisor Mr. Colville to attend urgently at a road traffic accident at Claypotts Junction, Dundee. He was to assist the emergency services by setting up a traffic diversion. At the scene of the accident, the pursuer became aware that a body lay crushed and burned in a car. Subsequently he became aware that there were in fact four bodies in the car. The pursuer avers that, despite two telephone calls to Mr. Colville (calls which the defenders deny: Answer 4, page 8A-B) advising him of the situation and requesting that he be allowed to leave the scene until the bodies had been removed as he had no training for such a situation, he was instructed to remain and to assist the police. He was then subjected to the sights and events outlined in Article 5 of Condescendence. He avers that as a result of the traumatic experience, he developed post traumatic stress disorder, which was further aggravated by a later assignment to Claypotts Junction in March or April 1999. He now sues his employers for damages on the grounds of unsafe system and vicarious liability for Mr. Colville. He avers failures on the defenders' part to take reasonable care (a) to issue instructions to supervisors well before 1998 that no employees should be required to remain at an accident scene where they would foreseeably be exposed to the sight and presence of dead and mutilated bodies or body parts, and (b) to provide post-incident de-briefing to any employees so exposed to allow someone such as the pursuer to come to terms with the experience in a safe and healthy way. He also avers breach of duty on the part of Mr. Colville in that the pursuer was refused permission to leave the scene although the risk of damage to the pursuer's mental health was reasonably foreseeable.

[2]At debate, senior counsel for defenders contended that the pursuer's action was irrelevant, and should be dismissed.

Defenders' submissions

Pursuer a secondary victim unable to satisfy the control mechanisms in Alcock

[3]Counsel for the defenders submitted that the pursuer was a secondary victim. He was therefore subject to the particular controls which the courts had, for policy reasons, imposed upon claims by such victims. Reference was made to Munkman, Employers Liability (13 edition) Chapter 6; *Alcock* v *Chief Constable of*

South Yorkshire Police [1992] 1 A.C. 310; *White (or Frost)* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455; and *Campbell* v *North Lanarkshire Council*, 2000 S.C.L.R. 373.

[4]The pursuer in the present case did not aver that he was personally in any danger of physical harm. This was not therefore a case where the facts required to be investigated in order to ascertain whether the pursuer was a primary or a secondary victim. It was clear from the pursuer's averments that he was a secondary victim. As a result, the control mechanisms set out in *Alcock* applied. The pursuer had no close ties of love and affection with the victims; nor had he, in the defenders' submission, been close to the incident in time and space; nor had he directly perceived the incident. While conscious therefore of the courts' reluctance to dismiss actions for damages for personal injuries at the stage of a debate (cf. *Jamieson* v *Jamieson*, 1952 S.C. (H.L.) 44 and *Miller* v *S.S.E.B*., 1958 S.C. (H.L.) 20), counsel submitted that, even if the pursuer proved every averment on record, his claim must fail. The action should be dismissed.

Insufficient averments to support assertion that psychiatric injury to the pursuer was reasonably foreseeable

[5]Counsel referred to Article 8 of Condescendence. The pursuer made averments about general knowledge in Britain that exposure to traumatic sights - including the sight of dead bodies, particularly of those who had died or been mutilated in dramatic and hideous ways - could result in onlookers developing mental illness in the form of post traumatic stress disorder. These averments were insufficient to provide a basis for the assertion that the defenders (and Mr. Colville) could reasonably have foreseen that the pursuer might suffer psychiatric injury if he attended the scene of the accident. There was no averment of fact explaining why the defenders ought to have known that a road worker such as the pursuer attending to assist by means of a traffic diversion would be likely to be exposed to traumatic circumstances. All that the defenders (and Mr. Colville) had been told was that there had been a road traffic accident involving fatalities.

No averments relating to the practice of other employers, particularly other local authorities

[6]Finally, counsel submitted that there were no averments about the practice of other employers or other local authorities. Thus one approach which the pursuer might have been expected to take (i.e. averring how other employers would deal with such a situation, and averring common practice) was completely lacking.

Pursuer's submissions

[7]Counsel for the pursuer submitted that a proof before answer should be allowed, all pleas standing. He referred to *Jamieson* v *Jamieson*, 1952 S.C. (H.L.) 44, at pages 50 and 63, and *Miller* v *S.S.E.B*., 1958 S.C. (H.L.) 20, at page 33. There was no onus upon the pursuer to show that he was bound to succeed. An action should be dismissed only if it must necessarily fail. The questions of law raised in the present case were important and difficult, and could not properly be resolved until the facts had been elucidated. The pursuer should be given an opportunity to prove the facts and circumstances surrounding the incident. Inquiry into the facts might also lead to an atmosphere favourable to the pursuer.

Primary or secondary victim

[8]Counsel for the pursuer submitted that the present case was not one in which the *Alcock* control mechanisms were relevant. In any event, on any reasonable definition, the pursuer was a primary victim of the negligence.

[9]Counsel submitted that the pursuer's case was not a "nervous shock" case. It was a case based on a breach of an employer's duty to protect his employee from foreseeable risk of injury to mental health in the course of carrying out the work he was paid to do. The pursuer's case was therefore based on a legitimate development of the law in *Walker* v *Northumberland County Council* [1995] 1 All E.R. 737, *Hatton* v *Sutherland* [2002] 2 All E.R. 1, and a number of Scottish decisions.

[10]**Control mechanisms irrelevant:** Counsel for the pursuer submitted that in *White (or Frost)* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 2 A.C. 455, *Bourhill* v *Young* [1943] A.C. 92, and other cases concerning nervous shock such as *Robertson* v *Forth Road Bridge Joint Board*, 1995 S.C. 364, the emergency or disaster causing the psychiatric damage had been created by the defender. For example, in *White*, the Chief Constable was sued because it was the police who had permitted the overcrowding in the stadium, and had thus caused the disaster. Applying the control mechanisms, it was held that police officers seeking damages did not fall within the category of persons permitted to claim. It was understandable why there was a "floodgates" issue in that sort of case, for if someone caused an accident, that person could have little control over who might witness or become involved in the accident or its aftermath, or be affected by the suffering of others. One could see that matters might become difficult if there was no legal control over the number of people eligible to claim. The range of claims could become very great, and there had to be some way of limiting them.

[11]But the circumstances in the present case were distinguishable. In *White*, no police officer brought a case based on *the failure of the Chief Constable to manage the officers properly during or following the disaster*. The only ground of fault relied upon was that the Chief Constable had caused the disaster. By contrast, in the present case, no case was made against the lorry driver who had caused the road traffic accident, or against the driver's employers. The only case made concerned the negligent mismanagement of the pursuer himself, during and after his involvement in the incident. The case was based upon duties owed only to the pursuer and perhaps to his team of road workers. So there was no need to be concerned about a floodgates argument. The primary/secondary victim classification, and the *Alcock* control mechanisms, were therefore utterly irrelevant. The policy considerations underlying that classification and the control mechanisms applicable to secondary victims simply did not arise in the pursuer's case.

[12]The pursuer made averments at pages 15E-16B about certain managerial steps which should have been taken both before and after the incident. Also at page 17D, the pursuer made averments about certain steps which should have been taken during the incident - in particular, allowing the pursuer and his team to leave the accident scene. Had the pursuer sued the lorry driver, his case would have been a very different one. Counsel suggested that, had the police officer plaintiffs in *White* based their case upon not being properly managed in the aftermath of the incident, the court might well have held that the control mechanisms had no relevance to their claims.

[13]Thus the pursuer's case was not "disaster-based". It was a case in which an average employee was arguing that he was entitled to a duty of care from his employer. It was established that an employer could be held liable for chronic stress suffered by employees as a result of working conditions: *Cross* v *Highlands and Islands Enterprise*, 2001 S.L.T. 1060, *Walker* v *Northumberland County Council,* [1995] 1 All E.R. 737. There was no logical reason why the pursuer could not recover damages in respect of an injury induced by an episode of acute occupational stress. Counsel acknowledged that he had found no reported case vouching such a proposition. The proposition was based upon drawing an analogy with the chronic stress decisions. There was no reason why an employer should not have a duty to avoid negligently exposing an employee to a situation of acute stress. Counsel accepted that this was a developing area of the law, and that there might be significant repercussions for the emergency services such as the police force, the fire brigade, and the ambulance service, depending upon the outcome of the present case.

[14]**In any event, the pursuer was a primary victim:** Counsel submitted that, *esto* one was obliged to categorise the pursuer as either a primary or a secondary victim, the pursuer was in fact properly classified as a primary victim. He had been the subject of negligent mismanagement. If another person had then suffered psychiatric injury as a result of what had happened to the pursuer, that other person would be the secondary victim of the negligent mismanagement of the pursuer. For example, in *Cross, cit. sup*., if another social worker had stumbled over the body of the suicide victim and had suffered shock and psychiatric injury as a result, that person would be a secondary victim, and the control mechanisms would apply to him. The present case was a development of *Cross*. The pursuer was a primary victim of the negligence in question, and the control mechanisms did not apply.

[15]**Primary/secondary victim classification in a state of flux:** Counsel for the pursuer next submitted that in any event, what was meant by a primary or a secondary victim was in a state of flux. The House of Lords had accepted that such was the case in *W.* v *Essex County Council* [2001] 2 A.C. 592. It was not therefore appropriate to attempt to categorise the pursuer in the present case as either a primary or a secondary victim without first having some sort of inquiry into the facts. Counsel had been unable to find any reported case directly in point. He referred to Munkman, Employers Liability (13 ed.) Ch.6, in particular paragraphs 6.01, 6.33, 6.46-6.47, and 6.61-6.62, and submitted that the categories of primary and secondary victim there described were not said to be exhaustive. Simply because the pursuer's claim did not fall within one of the authors' categories did not mean that the pursuer's case was irrelevant. What the pursuer was complaining of represented a reasonable development of the law relating to continuing exposure to stress.

[16]Counsel confirmed that he was not trying to present the pursuer as a rescuer. Counsel referred to *White* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, particularly Lord Griffiths at pages 462B-C, 464B-F; Lord Goff at pages 466C, 467A-B, 473H, 481B, 487E-F, and 489F-G; Lord Steyn at pages 491C-D, 496G, 497E-498A; and Lord Hoffmann at pages 501C, 502E, 503D-504F, 505E-506A, and 507A. Counsel submitted that it was fundamental to the decision in *White* that the Chief Constable was blamed for causing the incident. In the present case, the circumstances were different: the pursuer's employers had not caused the incident. Accordingly the argument which was deployed and rejected in *White* was not required in the pursuer's case. The pursuer's argument was not that, simply by being an employee, one could get round the control mechanisms. Counsel submitted that the court should be cautious about applying the policy controls (considered necessary for one particular problem) in a "blanket manner" to circumstances which had not been in the minds of their Lordships in the House of Lords in cases such as *White*. At page 504F of *White*, Lord Hoffmann commented:

"The control mechanisms were plainly never intended to apply to all cases of psychiatric injury. They contemplate that the injury has been caused in consequence of death or injury suffered (or apprehended to have been suffered or as likely to be suffered) by someone else ..."

At pages 505E-506A, Lord Hoffmann distinguished *Walker* v *Northumberland County Council, cit. sup*., pointing out that the employee in *Walker* was:

"in no sense a secondary victim. His mental breakdown was caused by the strain of doing the work which his employer had required him to do ..."

Counsel submitted that that was precisely the pursuer's position in the present case.

[17]In view of the developing state of the law, and the issues arising in the present case, counsel emphasised that there should be an inquiry into the facts before any decision in law were taken.

Duty of employer not to cause his employees psychiatric injury by exposing them to stress

[18]Counsel referred to cases concerning chronic stress, namely *Walker* v *Northumberland County Council* [1995] 1 All E.R. 737, at pages 749c-e; *Cross* v *Highlands and Islands Enterprise*, 2001 S.L.T. 1060*; Mather* v *British Telecommunications plc*, 2001 S.L.T. 325; *Fraser* v *State Hospitals Board for Scotland,* 2001 S.L.T. 1051; and *Green* v *Argyll and Bute Council*, February 28, 2002 (Lord Bonomy, unreported). These authorities supported the proposition that an employer owed his employees a duty not to damage their mental health. Counsel referred in particular to Lord Carloway in *Fraser, cit. sup*., at paragraphs [113], [119], and [121] - [125]; and to Lord Macfadyen in *Cross, cit. sup*., at paragraphs [57], [60], and [62] - [64]. In each case, the Lord Ordinary had held that an employer was under a duty at common law not to subject his employee to working conditions which were reasonably foreseeably likely to cause him psychiatric injury or illness.

[19]Counsel again emphasised that if the pursuer were to attempt to recover damages from the lorry-driver who had caused the crash, the pursuer would be unsuccessful, as he would be unable to satisfy the *Alcock*

control mechanisms. But the pursuer was complaining of unsafe system, as set out in Articles 9 and 10 of Condescendence: cf. *Cross cit. sup*.; *Fraser, cit. sup*.; and paragraphs [5] - [11] of Lord Bonomy's opinion in *Green* v *Argyll and Bute Council, cit. sup*. If an employer were liable for making an employee work with asbestos without supplying the necessary protective mask and clothing, he would similarly be liable if he sent an employee to work with corpses without taking care of the employee's psychiatric health. Counsel advised the court that, following upon the Piper Alpha disaster, bodies had to be recovered from residential units. Considerable efforts were made to provide counselling for those who had recovered the bodies. That was what was being contended for in the present case.

[20]There was therefore considerable authority for the proposition that an employer had a duty not to cause his employee psychiatric injury. The control mechanisms in *Alcock* were a quite different matter, and should be kept separate. In *Hatton* v *Sutherland* [2002] 2 All E.R. 1, the Court of Appeal laid down certain principles in cases involving long-term stress. At paragraph 43, the court stated in terms that there are no special control mechanisms applying to claims for psychiatric injury arising from the stress of doing the work one was required to do. Counsel referred to paragraphs [19] - [22], where the court confirmed that they regarded the victim in such cases as a primary victim and that no special control mechanisms applied, although there might be difficult issues of foreseeability and causation.

[21]Counsel then submitted that in *W.* v *Essex County Council* [2001] 2 A.C. 592, the House of Lords could be seen struggling with difficulties caused by the primary/secondary victim classification. In that case, foster parents had received certain assurances from the local authority and also an assurance from a social worker that a prospective foster child, a boy aged 15, was not a known sexual abuser. In fact, the boy was an abuser. He sexually abused the foster parents' children, aged between 8 and 12. The parents claimed damages for psychiatric injury which they suffered on discovering what had been happening to their children. Counsel submitted that the foster parents could not easily be categorised as either primary or secondary victims. Nevertheless the House of Lords allowed the case to go to proof. Counsel referred to Lord Slynn at page 598G *et seq*., and in particular *dicta* at page 600B-D:

"It is important in the present case to bear in mind these factors [*inter alia* the need for a psychiatric injury as opposed to, for example, acute grief] together with the limitations recognised in the *Alcock* case.

On the other hand, it is right to recall that in *McLoughlin* v *O'Brian* Lord Scarman, at page 430C-E, recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions; that in *Page* v *Smith* [1996] A.C. 155, 197G Lord Lloyd of Berwick said that once it was accepted that the defendant could foresee that his conduct would expose the claimant to personal injury "there is no justification for regarding physical and psychiatric injury as different 'kinds of damage'"; that in this still developing area the courts must proceed incrementally: *Caparo Industries plc* v *Dickman* [1990] 2 A.C. 605.

On a strike out application it is not necessary to decide whether the parents' claim must or should succeed if the facts they allege are proved. On the contrary, it would be wrong to express any view on that matter. The question is whether if the facts are proved they must fail. It is not enough to recognise, as I do recognise at this stage, that the parents may have difficulties in establishing their claim ...

Counsel also referred to further *dicta* at page 600H - 601B:

" ... Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as "primary" or "secondary" victims? As to being primary victims it is beyond doubt that they were not physically injured by the abuse and on the present allegations it does not seem reasonably foreseeable that there was a risk of sexual abuse of the parents. But the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations. Lord Goff of Chievely (dissenting) in the *Frost* case [1999] 2 A.C. 455, 472G said that Lord Oliver "did not attempt any definition of this category [i.e. of primary victims] but simply referred to a number of examples ..."

[22]Counsel submitted that the decision in *W*. v *Essex County Council* was dated January and March 2000 and was therefore fairly recent. It showed a developing jurisdiction, an incremental development by the courts. It also showed the House of Lords having difficulty applying the primary/secondary classification in a situation which had not been in the minds of their Lordships in *Alcock* and *White*. The *Alcock* controls had to be applied only in a restricted set of claims.

[23]Counsel then referred to *Campbell* v *North Lanarkshire Council*, 2000 S.C.L.R. 373, and sought to distinguish it. That was a case involving nervous shock, in which the defenders (who happened to be the pursuer's employers) were blamed for the explosion which had occurred. By contrast in the present case, someone other than the defenders had caused the disaster; but the defenders (the pursuer's employers) knew that the pursuer (their employee) would have to face the aftermath of the disaster.

[24]Counsel summarised his submissions in this section as follows:

- The present case was not a case in which the primary/secondary victim categorisation and the *Alcock* control mechanisms were relevant. The defenders' criticisms of the pleadings were simply another attempt by defenders in Scotland to limit claims for psychiatric damage by contending that the rules applicable to nervous shock were applicable to the pursuer.
- *Esto* it were thought necessary to use the primary/secondary victim classification, the pursuer was a primary victim: cf. *Walker* v *Northumberland County Council, cit. sup*.; *Fraser* v *State Hospitals Board for Scotland, cit. sup*.
- *Esto* the first two submissions were ill-founded, the position was so unclear that it would be appropriate to ascertain the facts before reaching any conclusions. Accordingly a proof before answer should be allowed: *cf. Miller* v *S.S.E.B., cit. sup*.

Foreseeability

[25]Counsel for the pursuer accepted that it was important in occupational stress claims to aver and prove that the risk of developing psychiatric illness was reasonably foreseeable: *Rorrison* v *West Lothian College*, 2000 S.C.L.R. 245, quoted in *Green* v *Argyll and Bute Council*, February 28, 2002. The defenders' criticism in the present case was essentially that the pursuer's averments related only to general knowledge, which (they claimed) was too vague and lacking in specification to be relied upon.

[26]Counsel for the pursuer submitted that on the contrary, the pleadings, read as a whole and treated as an outline of the pursuer's case, contained enough for a proof before answer. Counsel referred to the averments of general knowledge in Article 8 of Condescendence (general knowledge had been relied upon in *Cross cit. sup*., and *Fraser, cit. sup*.); the defenders' knowledge that the pursuer would have to attend road traffic situations where people had been killed; the defenders' knowledge that bodies may have been mutilated; the fact that the defenders ought therefore to have known that such employees were at risk of post traumatic stress disorder (particularly employees having to effect lane closures); and finally, the fact that on 15 September 1998, the defenders knew that the pursuer was employed as a road worker and was therefore someone who would be involved in closing off roads in emergencies (pages 4D-5A of the Record).

[27]Against that background, counsel submitted that the pursuer was clearly within the categories of persons referred to in Article 8 of Condescendence as being the sort of person who might be exposed to "traumatic sights including the sight of dead bodies, particularly of those killed and mutilated in dramatic and hideous ways", and therefore the pursuer was at risk of "developing mental illness in the form of post-traumatic stress disorder" (Article 8 of Condescendence).

[28]Counsel then reminded the court of the factual averments in Articles 3 to 7 of Condescendence, leading up to Article 8.

[29]In Article 3, the pursuer averred that on 15 September 1998 he was told to attend to assist the emergency services because a grain lorry had tipped over onto a car, and the car was on fire. The defenders knew that the

pursuer had been sent to a road traffic accident which was bad enough to require a lane closure. They knew that he was to assist the emergency services (the defenders' admissions could be found at page 7D). The defenders therefore knew that the scene awaiting the pursuer was a bad one. Furthermore, as was averred at page 5C-D, the defenders "quickly became aware of the salient facts when said facts were communicated to Mr. Colville [the pursuer's supervisor] by the pursuer after he arrived at the site ...". Accordingly even if the defenders could claim some ignorance at the outset, their state of knowledge was expanded when the pursuer telephoned Mr. Colville.

[30]In Article 4 of Condescendence, there were further averments about what was happening at the scene. The fire brigade, ambulance, and police were in attendance, and there was at least one body. The pursuer advised Mr. Colville of the "situation", which should be read as meaning everything contained in the previous averments relating to what was happening at the scene of the accident. In particular, Mr. Colville was told that there was at least one body; he was asked to allow the road worker team to leave the scene; he was told that they did not have the training to deal with the situation. Thus the defenders, or their supervisor Mr. Colville, had the knowledge that there had been a serious road traffic accident. There was at least one body, crushed under a car. Three emergency services were in attendance. It was not difficult to work out that the site would be gruesome. Mr. Colville was also aware that an employee at the site, having carried out his task of setting up a traffic diversion, wanted to leave. He was aware that the employee had no training for the situation. Counsel submitted that, if these averments were proved, the pursuer would have established that Mr. Colville knew or ought to have known, against the background of general knowledge about post traumatic stress disorder, that the pursuer's mental health might be at risk unless his request to leave the scene were granted. Later in Article 4 of Condescendence, Mr. Colville's knowledge was further expanded. He was advised that there were in fact four bodies in the car. Mr. Colville was at that stage therefore aware that four people had been crushed to death and had been in a fire. If the pursuer proved all that he averred, he would establish that Mr. Colville knew that the reasonable thing to do was to let the pursuer leave. There was no need for the pursuer to be forced to remain at the scene.

[31]As set out in Article 5 of Condescendence, the pursuer did in fact experience horrific sights. Counsel submitted that, in the light of the general knowledge and the particular facts of the case, it was arguable that the effect of the experience upon the pursuer was predictable. In a sense, the effect upon him was more predictable than the effect on the plaintiff in *Walker* v *Northumberland County Council, cit. sup*., where there had been a slow build-up. In the present case, the effect arose from a single exposure to trauma.

[32]In Article 6 of Condescendence, there were averments relating to a post-incident meeting on 22 September 1998 which had been attended by the pursuer, the defenders' managers, and the pursuer's trade union representative. At that meeting, the defenders had been provided with even more knowledge about the incident. This was relevant in relation to the ground of fault about failure to provide post-traumatic care. Despite the full information given at the meeting, the defenders took no steps to set up a counselling or a debriefing system.

[33]In Article 7 of Condescendence, the pursuer described the development of symptoms of post traumatic stress disorder following upon the single exposure to the traumatic scene. Causation was not therefore complex, in contrast with cases such as *Cross cit. sup.,* and *Walker, cit. sup*. There had been a very traumatic event, with well-understood psychiatric consequences which had been aggravated by a later re-visiting of the scene of the accident. At page 12B, the pursuer averred that the defenders had, since 2000, instructed their employees to avoid the immediate scene of an accident until the emergency services had cleared away any bodies and all debris. The pursuer's position was that such a system, simple as it was, should have been in place in 1998.

[34]Having reviewed the pleadings, counsel submitted that they were sufficient for inquiry. They were commendably succinct, unlike some chronic stress cases. General knowledge had been relied upon to some extent in *Fraser* v *State Hospitals Board for Scotland*, 2001 S.L.T. 1051. Also at page 1052L Lord Carloway had commented:

"However, it is a considerable leap to go from a position whereby a manager knows or ought to anticipate that his decisions will cause an employee emotional upset in one form or another to the stage where he knows or ought to anticipate that it will cause the employee to suffer psychiatric illness. No doubt some decisions in certain contexts might be predicted to cause such illness where, for example, an employee is asked to work in unexpected (by the employee) or extreme conditions."

While the pursuer in *Fraser* had in fact failed on the issue of foreseeability (paragraphs [129] - [130]), in every case it was for the judge having heard the evidence to decide whether there was sufficient foreseeability. General knowledge had also been relied upon in *Cross* v *Highlands and Islands Enterprise*, 2001 S.L.T. 1060, together with the particular facts known about the pursuer - that the pursuer had been referred to stress counselling; that he had approached the defenders about his problems; that his general practitioner had certified him as suffering from stress; and that he had been off work for about two months.

[35]Counsel accepted that, in the present case, there were no averments on record to suggest that the pursuer was particularly vulnerable or susceptible to psychiatric injury, but nevertheless contended that the body of general knowledge was sufficient to alert the defenders to the risk to which the pursuer was being put. There was therefore sufficient on record to satisfy the requirements of foreseeability.

The practice of other employers and local authorities

[36]In relation to the defenders' criticism that there were no averments relating to the practice of other employers or local authorities, counsel for the pursuer submitted that the defenders' position represented a rather out-dated view of the importance of that sort of evidence. Reference was made to Munkman, Employers Liability, paragraphs 2.90 - 2.98. Even if the proposition in *Morton* v *Dixon*, 1909 S.C. 807, were thought to be relevant, the pursuer was relying upon the second leg of the proposition, namely that what was required was so obviously wanted that it was folly not to provide it. There was no requirement, therefore, for averments about others' practice. It was also important to note that the House of Lords in *Bolitho* v *City and Hackney Health Authority* [1998] A.C. 232, ruled that while evidence of doctors' practice was highly relevant, the court nevertheless had the power to take an overriding view and to hold that a member of the medical profession acting in accordance with a practice had nevertheless been negligent. "Practice" alone might not be enough to excuse something.

[37]Counsel therefore submitted that (i) it was no longer necessary for a pursuer to aver and prove the current practice adopted by other roads authorities in relation to their road workers; and (ii) *esto* there were averments and proof about practice, the crucial issue concerning negligence was still one for the court: the defenders had to establish that, in all the circumstances, reasonable care had been taken.

[38]In relation to foreseeability and Mr. Colville, the pursuer's supervisor, the defenders in paragraph 3 of their Supplementary Note of Arguments had criticised the pursuer's averments in the following terms:

"3. The averments upon which the pursuer seeks to found knowledge of risk of injury on the part of Mr. Colville are irrelevant and lacking in specification. The mere fact that the pursuer advised Colville of the existence of bodies at the scene does not of itself give rise to knowledge on his part of a foreseeable risk of injury. On the pursuer's own averments, all that he was told to do by Colville was to remain at the scene of the accident."

[39]Counsel for the pursuer submitted that the paragraph was not a fair summary of what Mr. Colville knew. As set out in Article 10 of Condescendence, Mr. Colville had the general knowledge (which was hardly difficult to understand) together with telephone calls from an employee advising that there were bodies at the scene and that he wished to leave. A reasonable person would have known enough to advise the employee to leave. Not to have done so was a breach of the duty of care owed by Mr. Colville to his fellow employee.

Concluding submission

[40]Finally, counsel for the pursuer again referred to *Miller* v *S.S.E.B*. and *Jamieson* v *Jamieson, cit. sup*. He submitted that the present case was at the forefront of a developing area of personal injury law. The court was invited to allow an inquiry into the facts, before determining any legal issues.

Defenders' submissions in reply

[41]While acknowledging the interesting and wide-ranging nature of the submissions for the pursuer, senior counsel for the defenders did not depart from any of his submissions. He pointed out that the pursuer's counsel had recognised that he was attempting to break new ground. While the pursuer's counsel had referred to authority, he had accepted that there was no direct authority for his argument. Unless the court took the view that there was something for inquiry which could lead to success on the part of the pursuer, then the court was obliged to dismiss the action.

Primary or secondary victim

[42]Counsel for the defenders recognised that, over the past ten to fifteen years, there had been a degree of fluidity in relation to the classification of a victim as primary or secondary. Lord Steyn in *White* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 had recognised *Alcock* as the leading case. He reviewed all the authorities, and summarised the position at page 496G in the following terms:

"The decision of the House of Lords in *Page* v *Smith* [1996] A.C. 155 was the next important development in this branch of the law. The plaintiff was directly involved in a motor car accident. He was within the range of potential physical injury. As a result of the accident he suffered from chronic fatigue syndrome. In this context Lord Lloyd of Berwick adopted a distinction between primary and secondary victims: Lord Ackner and Lord Browne-Wilkinson agreed. Lord Lloyd said that a plaintiff who had been within the range of foreseeable injury was a primary victim. Mr. Page fulfilled this requirement and could in principle recover compensation for psychiatric loss. In my view it follows that all other victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the control mechanisms laid down in the *Alcock* case. There has been criticism of this classification: see H. Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" [1998] C.L.J. 91, 93. But, if the narrow formulation by Lord Lloyd of Berwick of who may be a primary victim is kept in mind, this classification ought not to produce inconsistent results. In any event, the decision of the House of Lords in *Page* v *Smith* [1996] A.C. 155 was plainly intended, in the context of pure psychiatric harm, to narrow the range of potential secondary victims. The reasoning of Lord Lloyd and the Law Lords who agreed with him was based on concerns about an ever widening circle of plaintiffs."

[43]Counsel accepted that policy issues could lead to apparently arbitrary distinctions. But Lord Steyn placed weight on consistency, so that individuals could know where they stood. Applying the primary/secondary classification, the present case clearly involved a secondary victim - secondary to the primary matter, namely, the injury to others which the pursuer averred he had observed.

[44]The pursuer's counsel had sought to distinguish the present case from *Page* v *Smith*, *Alcock*, and *White*: but that was not a legitimate way of looking at matters. To adopt the pursuer's approach would result in further policy decisions, additional to those already taken in *Alcock, Page*, and *White*. A claim such as the present, if allowed, would result in an "ever widening circle of plaintiffs" (in the words of Lord Steyn), particularly as, although Hillsborough-type disasters were relatively rare, road traffic accidents involving burned and mutilated bodies were unfortunately quite frequent. Employers in all the emergency services would be affected.

[45]The courts had never before been asked to deal with a claim formulated in quite the way in which the present pursuer had formulated his. But it would be extraordinary if, as the pursuer's counsel suggested, there had been a viable route of claim open to the police plaintiffs in *White*, yet that route had not been tried. In any event, the House of Lords would be bound to reject any such argument, as one of their aims in *White* had been to avoid a quite inequitable distinction between the police officer plaintiffs, and relatives of the

deceased who had been observers of the traumatic scenes. Standing the policy underlying the decision in *White*, the pursuer's claim was untenable. To allow the pursuer's claim would result in two different categories of persons having different rights of claim arising from having observed precisely the same incident.

[46]With reference to Munkman, Employers' Liability (13 ed.), Ch.6, senior counsel for the defenders submitted that the categories listed were, contrary to the pursuer's submission, exhaustive. It would be surprising if another category existed which had not been mentioned. Nevertheless the House of Lords might recognise circumstances which did not easily fit into any of the categories listed in Munkman. That was one way of looking at *W.* v *Essex County Council* [2001] 2 A.C. 592, a case which stood out as rather unusual. But the House of Lords had more freedom than a Lord Ordinary in the Court of Session. Counsel submitted that *W.* v *Essex County Council* was a classic example of a "hard case" where their Lordships had permitted an inquiry into the facts before the claim was finally rejected. But a Lord Ordinary had to apply the law as it had developed thus far - including of course *W.* v *Essex County Council*, although that case was very much the exception. There were no exceptional circumstances in the present case to justify a proof before answer.

[47]Counsel added that many of the authorities cited by the pursuer's counsel had related to chronic stress. Chronic stress cases were clearly distinguishable from the present case.

Foreseeability

[48]Senior counsel submitted that the pursuer's reliance upon general knowledge relating to post traumatic stress disorder was ill-founded. On the basis of the pursuer's averments, it could not be said that the defenders ought to have foreseen a risk of psychiatric harm: cf. the test as set out in *Rorrison* v *West Lothian College*, 2000 S.C.L.R. 245, quoted in *Green* v *Argyll and Bute Council,* February 28, 2002. There was no specific reason in the present case why the defenders could be fixed with foresight of a risk of psychiatric harm, as distinct from upset, revulsion and other normal human emotions: *cf. Rorrison*. This was particularly so where there was no history of psychiatric illness or incidents affecting the pursuer. In Article 2 of Condescendence, at page 4, the pursuer averred that he had no previous mental health problems. If a particular vulnerability on the part of the pursuer was important in a chronic stress case, it was *a fortiori* important in a case such as the present, where there had been one isolated incident and no history of psychiatric trouble. Counsel submitted that the pursuer's case was bound to fail on the issue of foreseeability.

Final submission

[49]In conclusion, senior counsel for the defenders submitted that, on the law as it currently stood, the pursuer was bound to fail. There was no need to send the case to proof before answer. It was always an easy option to send a case to proof before answer, but that option should not be adopted.

Opinion

Primary or secondary victim

[50]In *Cross* v *Highlands and Islands Enterprise*, 2001 S.L.T. 1060, Lord Macfadyen observed at page 1075 I-J:

"... the outdated (yet persistent) expression "nervous shock" is not synonymous with psychiatric injury. Nervous shock is a type of psychiatric injury, but it is not the only type."

See too *dicta* of Lord Carloway at paragraph [119] of *Fraser* v *State Hospitals Board for Scotland*, 2001 S.L.T. 1051.

[51]I agree. Damage to mental health may be caused in a variety of ways. One way has been categorised by the law as "nervous shock", which Lord Ackner in *Alcock* v *Chief Constable of South Yorkshire Police* [1992]

1 A.C. 310, at page 401, defined as:

"... the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind."

and Lord Oliver of Aylmerton at page 407D of that case referred to as:

"... an assault upon the nervous system of the plaintiff through witnessing or taking part in an event ...".

See generally *Bourhill* v *Young* [1943] A.C. 92; *McLoughlin* v *O'Brian* [1983] 1 A.C. 410; *Alcock, cit. sup*.; and *White (or Frost)* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455.

[52]Another mechanism of injury, recognised by the law in recent years, is chronic stress, usually in the context of employment. Cases in this category tend to feature the gradual and cumulative effect of events or working conditions, ultimately causing damage to the mental health of an individual: see for example *Walker* v *Northumberland County Council* [1995] 1 All E.R. 737; *Rorrison* v *West Lothian College*, 2000 S.C.L.R. 245; *Cross* v *Highlands and Islands Enterprise, cit. sup*., *Fraser* v *State Hospitals Board for Scotland, cit. sup*., and *Green* v *Argyll and Bute Council*, February 28, 2002 (Lord Bonomy, unreported).

[53]Yet further ways in which a person's mental health may be damaged as a result of another's negligence are being acknowledged by the courts. See, for example, *McLoughlin* v *Jones* [2002] 2 W.L.R. 1279; and the types of emerging claims listed by Lord Steyn in *White* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, at pages 495H-496A.

[54]If it be the case that injury to mental health has been caused by "the sudden appreciation by sight or sound of a horrifying event which violently agitates the mind", then the mechanism of injury is, as the law stands, categorised as "nervous shock". What the pursuer avers on record represents in my view a classic case of nervous shock, in that the pursuer was exposed to one single horrific incident during which he was forced to witness the physical suffering and death of other human beings, and as a result of which he developed symptoms of psychiatric injury. Neither in the pleadings nor during submissions at debate was it contended on behalf of the pursuer that he was a rescuer, or that he was exposed to some personal danger (or thought that he was so exposed).

[55]In the leading cases in the field of nervous shock, namely *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310, *Page* v *Smith* [1996] A.C. 155, and *White (or Frost)* v *Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, the House of Lords ruled that a person who suffers psychiatric damage as a result of witnessing the physical suffering or death of others is to be classified as a secondary victim. As Lord Keith of Kinkel explained in *Alcock* at page 396:

"...it is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person."

The persons who suffered the physical injuries or death are primary victims, although the concept of primary victim has been extended by the courts to cover persons who were involved in the traumatic incident and who were afraid for their own physical safety, but who were not in fact physically hurt; rescuers who were at risk of physical injury or who reasonably believed themselves to be at risk; and persons who participate in the incident in some way, and believe that they are the involuntary cause of another's death or injury. All others suffering psychiatric damage as a result of the traumatic incident are secondary victims: cf. *dicta* of Lord Steyn in *White* v *The Chief Constable, cit. sup*. at page 496G - 497C.

[56]Their Lordships in the House of Lords have frankly acknowledged that the development of this difficult area of law has been influenced by concerns about uncontrollable numbers of claims for psychiatric injury: see for example *dicta* of Lord Wilberforce in *McLoughlin* v *O'Brian* [1983] 1 A.C. 410, at pages 421-422:

" ... at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy ...there remains, in my opinion, just because "shock" in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims."

See too *dicta* of Lord Ackner and Lord Oliver of Aylmerton in *Alcock* v *Chief Constable of South Yorkshire Police, cit. sup*., at page 400E *et seq*. and page 418C-D; and Lord Steyn and Lord Hoffmann in *White* v *Chief Constable of South Yorkshire Police, cit. sup*., at pages 494C-G, 497B-C, and 511B. It is an undeniable fact that the law as it has developed leaves some persons, who may have suffered psychiatric injury through fault on the part of others, without a right of recovery: cf. observations of Lord Steyn at pages 491D and 496C-G in *White, cit. sup*.

[57]In the light of the authorities, it seems to me that, no matter what the context, whenever the *mechanism of injury* causing psychiatric damage is the witnessing of the suffering or death of others (the witness himself suffering no physical injury and not being in fear of physical injury), that defining feature automatically renders the witness a secondary victim, unless of course qualifying as a primary victim within the extensions mentioned above: cf. *dicta* of Lord Oliver of Aylmerton at page 407D-E of *Alcock*, and Lord Hoffmann at page 504C of *White*. Thus in my view the concept of secondary victim focuses upon *the way in which* the injury to mental health occurred - not the identity of the wrongdoer or wrongdoers, nor the reason why the witness happened to be at the scene (for example, a mere passer-by; or an employee instructed to work at the scene in the course of his employment.) If therefore a person suffers a psychiatric illness as a result of witnessing a traumatic accident in which others were injured or killed, or if he witnesses the immediate aftermath of such an incident, I consider that person to be a secondary victim, whether he sues the person whose negligence is alleged to have caused the accident; his employers, whose negligence is alleged to have caused him to be exposed to the accident or its aftermath without respite, without appropriate training, and without appropriate post-incident counselling or debriefing; or other defenders; or all or any of these. The crucial issue is the way or manner in which he received his psychiatric injury. The principles laid down by the Court of Appeal in *Hatton* v *Sutherland* [2002] 2 All E.R. 1, do not affect the House of Lord's rulings in relation to persons whose mental injury has been "caused in consequence of death or injury suffered (or apprehended to have been suffered) by someone else" (per Lord Hoffmann at page 504C of *White*).

[58]It follows that in my opinion the pursuer in the present case is a secondary victim, and that all the control mechanisms applicable to secondary victims apply to him.

[59]So far as the control mechanisms are concerned, had the only issue in contention been the pursuer's proximity to the incident in time and space, I would have allowed a proof before answer. Standing the pursuer's averments of his being urgently called to the scene, and being present at the scene along with the emergency services when bodies and body parts were still present, it is at least arguable in my view (contrary to the defenders' submission) that the pursuer was present at the immediate aftermath of the accident and that he was therefore sufficiently close in time and space: cf. Lord Wilberforce in *McLoughlin* v *O'Brian* [1983] 1 A.C. 410, at pages 422-423, and Lord Ackner in *Alcock* v *Chief Constable of South Yorkshire* [1992] 1 A.C. 310, at page 404H *et seq*. But the defenders' contention was also that the pursuer had no close ties of love and affection with the victims. That is not disputed. In my view therefore it follows that the pursuer cannot satisfy one of the control mechanisms, and accordingly that even if he were to prove every averment on record, his action must necessarily fail: cf. *dicta* of Lord Normand in *Jamieson* v *Jamieson*, 1952 S.C. (H.L.) 44 at page 50.

[60]Counsel for the pursuer suggested that a relatively recent House of Lords decision, *W.* v *Essex County Council* [2001] 2 A.C. 592, demonstrated that the primary/secondary victim categorisation was in a state of flux, and accordingly it would not be appropriate to attempt to place the present pursuer in any category without some inquiry into the facts. Counsel for the defenders suggested that the decision was something of an exception to the rule, representing a humane response to a hard case by permitting an inquiry into the facts before the claim finally failed.

[61]I accept that the opinions of their Lordships in *W.* v *Essex County Council* emphasise the subtleties and new circumstances which can arise in a difficult and developing area of law. But in my view the facts of that case could be viewed as falling within the category of "persons who participate in the incident in some way, and believe that they are the involuntary cause of another's injury". Much would depend on the evidence: but it could easily be envisaged that the foster parents might feel guilt about having brought an abuser into their household, and thus might fall within the definition outlined above, and on that basis could properly be regarded as primary victims. As Lord Slynn of Hadley put it at pages 600H-601D:

"Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as "primary" or "secondary" victims? [His Lordship reviewed some authorities, and continued:] ... I do not consider that any of the cases to which your Lordships have been referred conclusively shows that, if the psychiatric injury suffered by the parents flows from a feeling that they brought the abuser and the abused together or that they have a feeling of responsibility that they did not detect earlier what was happening, they are prevented from being primary victims ..."

[62]Accordingly without having to distinguish *Alcock* or *White*, or to make further exceptions, or to develop the law further, their Lordships in the House of Lords were wholly entitled to take the view that there was a real prospect that the foster parents might properly be regarded as primary victims. In the present case, however, the pursuer unfortunately cannot be so regarded.

[63]It follows that the present action must be dismissed. Such a result is obviously a harsh one for the pursuer. Nevertheless I consider it to be an inescapable consequence of the law as defined by the House of Lords over recent years in their endeavour to keep claims for injury to mental health within acceptable limits.

[64]If, contrary to the above, a claim such as the present one were to be allowed, there would be unacceptable consequences. For example:

- If there were to be another major disaster such as the Hillsborough disaster (*Alcock* and *White*, cit. sup.), emergency services personnel involved, such as police officers and ambulance workers, might have stateable claims against their employers in respect of psychiatric injury suffered - despite having no close ties of love and affection with any of the victims - whereas ordinary members of the public present at the stadium, witnessing the same horrors, and suffering as much or more than the police officers, would not. That was the very anomaly or "unacceptable distinction" (per Lord Goff of Chievely in *White* at page 483F) which the House of Lords strove to avoid in *White*.
- Similarly at any road traffic accident caused by a third party and not by the roads authority, ordinary bystanders and onlookers (with no close ties of love and affection with the victims) who suffered psychiatric injury would be unable to claim damages, whereas a road worker such as the pursuer might have a stateable claim arising from the roads authority's alleged mismanagement of him as an employee. Again this would bring about the inequitable situation which the House of Lords wished to avoid in *White*.
- On the pursuer's argument, if the roads authority had *caused* the road traffic accident, perhaps as a result of inadequate or confusing road signs, and in addition had mismanaged the pursuer as outlined in the pleadings, the pursuer would not be eligible to claim damages. But if the roads authority were culpable to a lesser extent in that a third party was the cause of the accident, although the roads authority had still mismanaged the pursuer, the pursuer would be eligible to claim damages. That would appear to be an odd result in a situation where the degree of culpability on the part of the roads authority was lesser.
- Despite the pursuer's counsel's contention to the contrary, I consider that if the pursuer's claim were held to be relevant, there would be an opening of floodgates. All the services who have to deal with traumatic situations - the police, the ambulance service, the fire brigade, to mention but a few - would be affected.

[65]While the above is sufficient to dispose of this case, in deference to the persuasive arguments presented to me, I now give views on the question of an episode of acute stress at work, the issue of reasonable foreseeability in this case, and the lack of averments relating to the practice of others.

Episode of acute stress at work

[66]I do not exclude the possibility that in certain circumstances, an employee might be entitled to recover damages in respect of injury to mental health caused by one single episode of acute stress at work, resulting in, for example, post traumatic stress disorder. The researches of counsel did not disclose any reported precedent. All existing authorities are concerned with chronic stress arising from an accumulation of work-related demands and conditions: see for example *Walker* v *Northumberland County Council* [1995] 1 All E.R. 737; *Rorrison* v *West Lothian College*, 2000 S.C.L.R. 357; *Fraser* v *The State Hospitals Board for Scotland*, 2001 S.L.T. 1051; *Cross* v *Highlands and Islands Enterprise*, 2001 S.L.T. 1060. But in my view it is conceivable that an employee might suffer psychiatric illness as a result of one acute episode of stress. The employee might be instructed to undertake a task which in the particular circumstances was reasonably foreseeable would cause him psychiatric damage.

[67]An example might be as follows: if the employers of a road worker such as the pursuer received information that the road worker's son, driving the family car, had been involved in a horrific road traffic accident, yet nevertheless insisted that the pursuer attend the scene because they were temporarily short-staffed, and if the road worker subsequently developed severe clinical depression and post traumatic stress disorder, it seems to me that the road worker would have a stateable case for inquiry by proof before answer. A crucial element in that example absent in the present case is the close ties of love and affection between father and son: thus the road worker, a secondary victim even if choosing to sue his employers rather than the driver alleged to have caused the accident, would be able to satisfy one of the control mechanisms set down by *Alcock*.

Reasonable foreseeability of psychiatric injury

[68]In *Hatton* v *Sutherland* [2002] 2 All E.R. 1, a case concerning employers' liability for an employee's psychiatric illness, the Court of Appeal held that, in the context of foreseeability, the question is whether the kind of harm to the particular employee was reasonably foreseeable, not whether psychiatric injury was foreseeable in a person of ordinary fortitude. In other occupational stress cases, courts of first instance in both England and Scotland have emphasised that, in order to succeed, a pursuer must be able to prove that an employer had knowledge such that it was reasonably foreseeable not simply that an employee would be distressed, upset, or emotionally disturbed by certain circumstances or events, but that he would suffer psychiatric damage: see *Walker* v *Northumberland County Council; Rorrison* v *West Lothian College*; *Fraser* v *Greater Glasgow Health Board,* paragraphs [105] and [129] et seq.; *Cross* v *Highlands and Islands Enterprise*, paragraph [67] *et seq*., *Green* v *Argyll and Bute Council,* paragraphs [10]-[11].

[69]Against the background of these authorities, I cannot accept that it is sufficient for a pursuer to make general averments about growing awareness of the possibility of psychiatric damage such as post traumatic stress disorder (Article 9 of Condescendence)

and about a road traffic accident which had resulted in fatalities. In my view, it would be necessary for the pursuer to be able to aver and prove something about his own particular state of mind, or health, or past history, or personal circumstances, which would alert his employers to the fact that exposure of that particular employee to the accident might result in a real risk that he would suffer psychiatric damage. In the present case, there was nothing in the pursuer's work record or personal or medical history to alert his employers to such a risk.

[70]In relation to Mr. Colville, the pursuer's case for reasonable foreseeability rests upon the averments of general knowledge together with contemporaneous personal telephone calls made by the pursuer to Mr. Colville explaining the horror of the situation, the pursuer's lack of training, and his clear wish to be allowed

to leave the scene. Had I not ruled that the pursuer was a secondary victim unable to satisfy the control mechanisms laid down in *Alcock*, I would have allowed an enquiry into the facts to permit the pursuer to seek to prove *inter alia* the telephone calls, their content, and what Mr. Colville should reasonably have foreseen in all the circumstances. Before allowing a proof before answer, I would have put the case out By Order to enable counsel to make submissions on the question whether certain averments should formally be excluded from probation.

The practice of other local authorities

[71]It is not, in my view, mandatory for a pursuer to make averments that other roads authorities in 1998 had systems such as the pursuer desiderates. Had the pursuer been able to aver a sufficiently relevant case without referring to the practice of other roads authorities, there may have been no need to refer to other roads authorities.

Conclusion

[72]For the reasons given above, I shall sustain the defenders' first plea-in-law and dismiss the action.