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NERVOUS SHOCK,[1] RESCUERS AND EMPLOYEES – PRIMARY OR SECONDARY VICTIMS?

The Court of Appeal's decision in *Frost* is important in that it is the first decision of the lower courts concerning claims by rescuers and employees for psychiatric injuries after the two House of Lords' judgments of *Alcock* and *Page*. It is evident that the judges in *Frost* were presented with an uphill task of interpreting and applying the principles laid down by the Law Lords in *Alcock* and *Page*, in particular the definition of primary and secondary victims. This article examines the difficulties faced by the courts in categorising rescuers and employees as primary or secondary victims for the purposes of imposing liability for nervous shock.

I. INTRODUCTION

IT has long been established[2] that if a person, by his own negligence, places himself in a position of danger,[3] or if he creates a situation whereby other people or their property are likely to suffer damage, he owes a duty of care to the rescuer or Good Samaritan who may be injured while attempting to undo his wrong. It is also true that at common law, an employer has a duty to take reasonable care for the safety of his employees.[4] The ability of a rescuer to recover in negligence for physical injury sustained in the course of attempting to save others in peril has never been doubted.[5] Nor

1 The term "nervous shock" has been criticised as "crude"(*Jaensch* v *Coffey* (1984) 155 CLR 549, at 552, *per* Gibbs CJ). Lord Bridge lamented that lawyers "quaintly" persisted in calling it as such (*McLoughlin* v *O'Brian* [1982] 2 All ER 298, at 312). Bingham LJ thought that it was "a misleading and inaccurate expression" (*Attia* v *British Gas Plc* [1988] QB 304, at 317). In The Law Commission Consultation Paper No 137, *Liability for Psychiatric Illness*, it has been rejected in favour of the term "psychiatric illness". Nevertheless, the term is used in this paper because over the years it has acquired a certain judicial meaning. In this paper, expressions like "nervous shock", "psychiatric illness", and "psychiatric injuries" are used interchangeably to mean the same thing.

2 The earliest English case which allowed recovery to the rescuer was probably *Haynes* v *Harwood* [1935] 1 KB 146.

3 *Harrison* v *British Railways Board* [1981] 3 All ER 679.

4 For instance, see Lord Wright in *Wilson & Clyde Coal Co Ltd* v *English* [1938] AC 57, at 84 and Lord Oaksey in *Paris* v *Stepney Borough Council* [1951] AC 367, at 384.

5 There does not appear to be a difference whether the rescuer is a lay rescuer or a professional one, *eg*, fireman: see *Ogwo* v *Taylor* [1987] 3 All ER 961.

can an employer escape liability for negligently causing physical injuries suffered by an employee in the course of the latter's employment. Much more difficult is the granting of damages to rescuers or employees who have suffered shock-induced psychiatric harm or nervous shock as a result of witnessing the accident or its aftermath while trying to assist the victims or co-workers.[6]

Liability for nervous shock has traditionally been an area of law where its expansion is vigilantly guarded against by the courts. Under English law, recovery has been limited to persons related to the victim (or for that matter, the victim himself)[7] such as his spouse or parents,[8] or at least someone close in care, although it has been said that the categories of claimants were not closed.[9] The courts, however, have viewed rescuers and co-workers, who are totally unrelated to the victim, in different light and have allowed recovery for psychiatric injuries suffered by rescuers[10] or co-workers.[11]

Unfortunately, there are few cases in this respect which is one of the most vexed and tantalising areas of the modern law. The fact that only four cases[12] on nervous shock so far have reached the House of Lords explains the lack of clear legal guidelines. The opportunity for the courts to expound the legal principles relating to the recovery of damages for psychiatric injuries

6 See Leong Huey Sy, Susanna and Ter Kah Leng, "Negligence Liability to Primary Victims of Psychiatric Illness" (1996) 8 SAcLJ 213 at 219-227 for a brief discussion on the liability of an employer for work-induced psychiatric injury suffered by his employee.

7 *Page* v *Smith* [1995] 2 All ER 736. The plaintiff was involved in a car accident with the defendant. He was physically unhurt in the collision, but the accident caused him to suffer psychiatric illness which was triggered off as a result of his predisposition. The House of Lords held that the plaintiff was a primary victim. In such a case, the test would be whether the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer was in the affirmative, then the duty of care was established, even though physical injury did not in fact occur. The plaintiff was not required to prove that the injury by nervous shock was reasonably foreseeable by the defendant and it was irrelevant that the defendant could not have foreseen that the plaintiff had an 'eggshell personality'.

8 *McLoughlin* v *O'Brian* [1982] 2 All ER 298 (mother).

9 *Ibid*, *per* Lord Wilberforce, at 304.

10 *Chadwick* v *British Railways Board* [1967] 2 All ER 945.

11 *Dooley* v *Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271. In this case, a crane driver was lowering heavy containers into a ship's hold when the rope holding one of them broke. He feared that he had hurt his co-workers working below and as a result suffered nervous shock. Donovan J held that the employers were under a duty of care towards the plaintiff, who was within the range of foreseeable danger of physical impact or shock and that they were in breach of that duty in supplying a defective sling.

12 *Bourhill* v *Young* [1942] 2 All ER 396; *McLoughlin* v *O'Brian*, *supra*, note 8; *Alcock* v *Chief Constable of the Yorkshire Police* [1991] 4 All ER 907 and *Page* v *Smith, supra*, note 7. They were strictly not rescue cases.

by rescuers and employees arose once again in the recent English Court of Appeal case of *Frost* v *Chief Constable of the South Yorkshire Police*.[13] *Frost* is particularly important as leave to appeal to the House of Lords has been denied. This article examines the distinction between primary and secondary victims as laid down by the House of Lords and its significance for the determination of liability in nervous shock cases. In addition, the complexities encountered by the court in *Frost* in applying the principles laid down by *Alcock* v *Chief Constable of the South Yorkshire Police*[14] and *Page* v *Smith*[15] are also highlighted.

II. The Categorisation of Primary and Secondary Victims

A. *The House of Lords' Cases*

In any action for damages in the tort of negligence, the plaintiff has to prove that the defendant owes him a duty of care. This is regardless of whether the damage or injury sustained may be physical or psychological. However, in cases involving liability for nervous shock, the House of Lords has, apparently, gone further as to divide the victims into two categories.

The distinction between a primary and secondary victim was first considered in *Alcock* v *Chief Constable of the South Yorkshire Police.*[16] Lord Oliver of Aylmerton in his judgment said that it has become customary for the courts to classify cases in which damages are claimed for injury caused by an assault on the nervous system of the plaintiff through the witnessing or participation in an event under a "single generic label" as cases of "liability for nervous shock".[17] This, the learned judge said, "maybe convenient but in fact the label was misleading".[18] It is misleading if and to the extent that it leads to the conclusion or assumption that just because the medium through which the injury arises is similar, a *single* common test to determine liability will be adopted. As such, to avoid being misleading, Lord Oliver

[13] [1997] 1 All ER 540.
[14] *Supra*, note 12.
[15] *Supra*, note 7.
[16] *Supra*, note 12, at 922-923. *Alcock* arose out of the same football disaster at the Hillsborough Stadium in 1989 as that in *Frost*. The sixteen claimants in *Alcock* were relatives of persons who were killed or injured at the disaster. Some were at the match but not in the area where the disaster occurred. Others either watched the event over the television where scenes from the ground were broadcast live from time to time during the course of the disaster or heard the news broadcast over the radio. The House of Lords rejected all their claims by holding that they were all secondary victims and they did not satisfy the tests of proximity.
[17] *Ibid*, at 922.
[18] *Ibid.*

said that these cases were to be broadly divided into two categories. They were either "cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, [or] those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others."[19] His Lordship went on to classify rescuers and people who had been put in the position, as a result of the defendant's negligent act, of being, or thinking that they were about to be or had been, the involuntary cause of another's death (the "involuntary participants")[20] as participants. Although Lord Oliver's speech in this respect was mere *obiter*, it was significant in that he emphasized the importance of making a distinction between the plaintiffs claiming for nervous shock and in his opinion, a distinction must be made between a "participant" and one who was not, such as a mere bystander. With regard to the latter category of plaintiffs, Lord Oliver felt that it was convenient to describe them as "secondary" victims.[21] Whether these plaintiffs were allowed to claim or not depended on whether the court viewed the defendant as having owed them a duty of care. This duty of care was in turn determined by whether the defendant and the plaintiffs were "in a relationship of sufficient proximity or directness".[22] It was without doubt that "policy considerations"[23] would influence the perceptions of what the courts considered to be "sufficient proximity".[24]

The categorisation of the plaintiffs in nervous shock cases into primary and secondary victims received further judicial consideration in the later case of *Page* v *Smith*,[25] which involved a road accident. Lord Lloyd of Berwick delivering the judgment in the majority[26] said that the distinction

19 *Ibid*, at 923.

20 This was the term used in the Law Commission Consultation Paper No 137, *Liability for Psychiatric Illness*, at para 2.28.

21 *Supra*, note 12, at 926.

22 *Ibid*, at 925.

23 According to Lord Wilberforce in *McLoughlin*, *supra*, note 8, at 303-304, the policy arguments against a wider extension of the law in this area can be stated under four heads. First, that any extension might lead to a proliferation of claims, and possibly fraudulent claims. Second, any extension might be unfair to the defendants, facing them with numerically disproportionate claims. Third, to extend liability beyond direct and plain cases would increase evidentiary difficulties and lengthen cases. Fourth, any extension might be thought to be matter for the legislature, like the approach taken in New South Wales and the Australian Capital Territory.

24 *Supra*, note 12, at 926.

25 *Supra*, note 7.

26 The plaintiff in *Page* won by a three to two majority in the House of Lords. It is interesting to note that the Court of Appeal was unanimous in disallowing recovery. As such, a total of five Law Lords took the dissenting view.

between primary and secondary victims was "obvious and of long standing".[27] He said that *Page* was the fourth occasion upon which the House of Lords has been called upon to determine liability under nervous shock. The difference between *Page* and the previous three cases[28] was that the latter all involved plaintiffs that were "outside the range of foreseeable physical injury" whilst the former concerned a plaintiff that was a participant, one who was himself directly involved in the accident and so well within the range of foreseeable physical injury.[29] Therefore a primary victim was one who was within the area of foreseeable physical injuries and a secondary victim was one who was outside such an area.[30] To impose liability on the defendant with respect to a primary victim, it was sufficient to prove that the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. Once that was established, the defendant would be liable and he must take the plaintiff as he found him, eggshell personality and all. The control mechanisms put in place by the courts in respect of claims by secondary victims were not applicable and the only limiting factor was that before the defendant could be held liable for psychiatric injury suffered by a primary victim, he must have at least foreseen physical injury.

As far as a secondary victim is concerned, liability must primarily hinge upon foreseeability of injury by nervous shock by the defendant. But this alone is insufficient to impose liability. The plaintiff must further establish the requisite elements of proximity: proximity to the event in time and space and proximity of relationship between the primary victim and the secondary victim.[31] In addition, a secondary victim may only be allowed to recover damages for nervous shock if the defendant should have foreseen injury by shock to a person of normal fortitude or "ordinary phlegm".[32] All these control mechanisms were necessary because the courts felt that important policy considerations, such as floodgates, bogus or unmeritorious claims, dictated their presence.

In *Page*, Lord Lloyd once again reiterated the importance of distinguishing the plaintiffs in nervous shock cases, not only because that this distinction

27 Lord Lloyd noted, *ibid*, at 755, that the distinction was recognised by Lord Russell in *Bourhill* v *Young*, *supra*, note 12, where he pointed out that Mrs Bourhill was not physically involved in the collision.

28 *Bourhill*, *McLoughlin* and *Alcock*.

29 *Supra*, note 7, at 755.

30 *Ibid*, at 758.

31 See *Alcock*, *supra*, note 12, at 914, *per* Lord Keith and *Page*, *supra*, note 7, at 759-760, *per* Lord Lloyd.

32 Lord Lloyd in *Page*, *supra*, note 7, at 760.

was important factually but also that the distinction carried with it significant legal consequences. In his formulation of who is the primary and secondary victim, Lord Lloyd admittedly made references to Lord Oliver's speech in *Alcock* and it might appear that the two Law Lords were in consonance with each other. However, a closer reading of the two judgments reveals that the definitions of a primary and a participant are not totally the same. Lord Lloyd spoke of one who was within the area of foreseeable physical injuries as opposed to those who were not. Whereas, Lord Oliver considered as crucial whether the plaintiff has participated or has been involved in the event as opposed to those who merely witnessed it. It is submitted that Lord Oliver's formulation is a broader one and may encompass those plaintiffs as primary victims when they are unlikely to succeed under Lord Lloyd's test. This difference in formulation will lead to great difficulties, as we shall see below, when the court in a subsequent case of *Frost* attempted to apply them to rescuers and employees.

Before our discussion of *Frost*, it may be useful to note that in The Law Commission Consultation Paper No 137, *Liability for Psychiatric Illness*, the Commission has grouped rescuers under the category of "Persons with no tie of love and affection to the primary victim" together with bystanders and involuntary participants. Effectively, rescuers are considered by the Commission to be in a recognised category of claim amongst the secondary victims. This is interesting as the Consultation Paper was written at a time before the House of Lords had decided upon *Page*. Yet the Commission took an approach which was subsequently echoed in Lord Lloyd's formulation of primary and secondary victims, even though the Commission did not go so far as to define the relevant terms.

On this particular note, we turn to examine the case of *Frost* v *Chief Constable of the South Yorkshire Police*.[33]

B. *Frost* v *Chief Constable of the South Yorkshire Police*

1. *The Facts*

The claims of the plaintiffs in this case arose as a result of the football disaster at the Hillsborough Stadium in Sheffield on 15 April 1989. The Hillsborough tragedy was of a catastrophic nature and it was "something unique, outside normal police experience".[34] A total of 96 of the football

[33] *Supra*, note 13.

[34] *Ibid*, at 556, *per* Henry LJ, where he described the theme of the tragedy as one of chaos, helplessness, guilt at not individually being able to achieve more and shame that police crowd control decisions had caused or contributed to the disaster.

match spectators died, and many more seriously injured, due to crushing at this unfortunate event. It was not disputed that the immediate cause of the disaster was the negligent decision of a senior police officer to open an outergate to the grounds without cutting off access to two spectators' pens from which there was no exit. The Chief Constable admitted negligence but denied the existence of a duty of care to the police officers in question.

At first instance, a total of six police officers brought their claim against the Chief Constable. There were varying degrees of participation and involvement by the police officers at the disaster. Three of them were at the grounds on duty. Of the three police officers on duty, two attended to the victims at a temporary morgue while the other attempted to extricate the victims from the overcrowded and crushing pens. The fourth and fifth police officers had been drafted in to help with the situation whilst the sixth officer was not on duty at the ground and was only acting as a liaison officer between the hospital staff and the casualty bureau. All the police officers, with the exception of the sixth, saw the horrific and gruesome scenes of accumulating dead bodies and experienced the distress and horror suffered by the victims, their friends and relatives.

The police officers based their claims against the Chief Constable on two grounds:

(a) breach of the duty of care owed to them by the Chief Constable arising from their service as police officers when acting under his direction and control; and

(b) breach of the duty of care owed to them as rescuers.

On the first issue, the lower court found that although the police officers were strictly not the employees of the Chief Constable, a relationship analogous to that of a master and servant existed between the parties and as such gave rise to the presence of a duty of care which extended to psychiatric illness. However, according to the learned Waller LJ, this duty of care did not arise if the police officer was a "secondary victim" unless he could establish that a duty was owed to him as a rescuer. With regard to the second ground of liability, the learned judge found that only Inspector White was a rescuer in law and he could not recover because he was a professional rescuer and since he was not closely involved in the participation of the incident or its immediate aftermath, strong policy considerations dictated that he should not be able to recover when a bystander could not. Therefore none of the police officers succeeded in their claims at the lower court.

The Court of Appeal in a two to one majority judgment, allowed recovery for four of the five police officers who appealed.[35] It is interesting to note that although the judges in the majority came to the same conclusions with respect to each of the appellants, they did not wholly agreed with each other on the reasoning behind the decision.

2. *The Employee Issue*

A factor which stood in the appellants' favour in *Frost* was that they were not only rescuers but were also employees (or quasi employees for that matter) at the material time. In fact, this was the main ground for allowing the appeal. Rose LJ thought that if an employee was, being at the ground in the course of duty, within the area of risk of physical or psychiatric injury and was thus, by the employer's negligence, exposed to the exceptionally horrific events, there was a breach of duty to him by the employer. On this ground, he found that three of the police officers were entitled to recover. From his judgment, it could be seen that Rose LJ took the simple approach of marrying Lord Oliver and Lord Lloyd's definitions of a participant and a primary victim. In his view, once a plaintiff brings himself within the master and servant relationship, he is automatically considered as a primary victim and a participant such that the control mechanisms relating to a secondary victim did not apply. As long as the plaintiff could prove that he was within the area of risk of physical or psychiatric injury, he could claim. However, as pointed out by Henry LJ, the categorisation of a plaintiff as a primary or secondary victim might not be as straight forward as Rose LJ made it out to be.

Henry LJ arrived initially at the same conclusion that the police officers were participants of the incident and so were primary victims.[36] The learned judge pointed out that the officers were on duty under the contract of

[35] Of the six police officers who brought their claims at the lower court, Det Con Hallam did not appeal to the Court of Appeal. However, the legal position of those police officers who were in his situation were considered in Rose LJ's judgment, *ibid*, at 551, where Rose LJ said that although these police officers were not rescuers "because they were not sufficiently closely involved in the crushing incident or its immediate aftermath" they were officers on duty and were within the area of risk of physical or psychiatric injury. As such, there was a breach of duty of care by the defendant to these officers.

[36] Henry LJ was of the opinion that Lord Oliver's third category referred to master and servant cases, *ibid*, at 560. It is submitted that the category is actually much narrower in that the plaintiff must be, by the defendant's negligence, made to think that he is about or has been, the involuntary cause of another's death. This category would, strictly speaking, not cover the situation in *Frost*. It is therefore necessary to argue from first principle to see if employees should be considered as primary victims.

employment and had no other choice but to be present at the scene which was a result of their employers' negligence. The case would be entirely different for a police officer who was not on duty. He could leave with a clear conscience. Having said that, Henry LJ was of the opinion that his initial assessment must be reconsidered in the light of the House of Lords' decision of *Page* which in his view gave a narrower definition of a "primary victim". Using Lord Lloyd's test, the police officers in question although were close to the scene of the incident, they were not "direct victims of the crushing or had a reasonable fear of immediate physical injury for themselves."[37] Therefore, the officers would be "secondary victims" as opposed to "primary victims".[38]

It is submitted that Henry LJ's judgment is plausible until this point. The learned judge however went on to say that he was not extremely concerned with the labelling of the plaintiffs as primary or secondary victims. This was because the distinction of primary and secondary victims was important in so far as determining whether the proximity test was presumed to be satisfied or must be critically examined by the courts. Since case authorities in the area of employers' duty to employees revealed that the proximity test may still be necessary to determine liability, the issue must therefore be examined. In any case, Henry LJ found that the officers, even if they were to be considered as secondary victims, satisfied the proximity control mechanisms laid down by the law in *Page* as "the chief constable must have had the police officers on crowd control in mind, and must have contemplated them as being directly affected".[39] He then went into a lengthy discussion on the four heads of policy argument as laid down by Lord Wilberforce in *McLoughlin* v *O'Brian* and concluded finally that the plaintiffs should be allowed to recover. Despite the fact that Henry LJ's judgment was the most analytical of the three, it is submitted that his judgment is flawed on three grounds. First, the reason for the two Lordships taking such great pains to lay down the rules relating to primary and secondary victims was to provide the courts with some shortcuts in determining liability in nervous shock cases. The law would be taking a step backwards if the courts have to go through the laborious process of establishing proximity each time they are faced with a claim involving nervous shock even after *Alcock* and *Page*. Second, Henry LJ's definition of the proximity test was actually the *foreseeability* test used in the cases involving primary victims. Third, it is regrettable that halfway through his judgment, he introduced

[37] This was the finding of the trial judge Waller J.
[38] *Supra*, note 13, at 560-561.
[39] *Ibid*, at 564.

the American concept of "direct victim" and equated it with "primary victim" without actually defining them both. This would only serve to complicate this already vexed area of law.

The impact of the confusion brought about by the discrepancies in the definition of primary victim was most felt in Judge LJ's judgment. Judge LJ frankly pointed out that nothing in the Law Lords' speeches in *Alcock* suggested that an employee who suffered psychiatric injuries as a result of his employer's negligence would automatically become a primary victim. Depending on the extent of their involvement in the incident, some employees would be primary victims while others would not. The learned judge did not seem to draw a distinction between a rescuer and an employee. The fact that there existed a master and servant relationship between the appellants and the respondent was not even considered. In his opinion, as long as the police officers could not prove that they were at any time present in an area where they were exposed to the risk (actual or apprehended) of physical injury arising from the chief constable's negligence, they were secondary victims. They were thus subject to the control mechanisms. Since none of the appellants could fulfil the element of proximity of relationship between himself and any person suffering injury or death, the appellants should not be allowed to recover. It is submitted that Judge LJ's approach is too restrictive and does not reflect the present status of the law. The correct approach should thus be to straighten out the differences in the definition of primary and secondary victim and determine whether and under what circumstances an employee would fall within such definition of a primary victim. This, sadly, was not done by the Court of Appeal in *Frost*.

3. *The Rescuer Issue*

Frost was complicated by the fact there were varying degrees of participation and involvement by the police officers at the disaster. Rose LJ seized the opportunity to list down instructively the factors to be considered when the courts are called upon to decide who in law is a rescuer. These factors included:

1. the character and extent of the initial incident caused by the tortfeasor;
2. whether that incident has finished or is continuing;
3. whether there is any danger, continuing or otherwise, to the victim or to the plaintiff;
4. the character of the plaintiff's conduct, in itself and in relation to the victim;

5. how proximate, in time and place, the plaintiff's conduct is to the incident.[40]

On the facts, Rose LJ found that only three of the six police officers could claim by virtue of the employer and employee relationship. The rest would therefore need to bring themselves within the category of rescuers before they could be allowed to claim.[41] Rose LJ relied on Lord Oliver's definition and concluded that rescuers were in the category of primary victims as participants of the incident. On this premise, Rose LJ found that three officers (including one Inspector White who was also allowed to recover on the ground of master and servant relationship) were rescuers "taking part in the immediate aftermath of the incident".[42]

Henry LJ thought that the same police officers could have succeeded on the wider head of employer/employee relationship.[43] Nevertheless, he essentially concurred with Rose LJ on the latter's view on rescuers. The learned judge added that he felt that public policy favoured a wide rather than a narrower definition of rescuer so as to ensure that "those brave and unselfish enough to go to the help of their fellow men will be properly compensated if they suffered damage as a result."[44] However, he did not go on to elaborate on the wide definition of rescuers which he preferred.

In his dissenting judgement, Judge LJ also gave helpful insights to the issue of who is a rescuer in law. He discussed in detail the rights of a rescuer against the negligence of the tortfeasor. In his opinion, there was no difference between a "professional rescuer" and a civilian answering the calls for help. Each one of them was entitled to recover damages for injuries sustained as a result of their rescue efforts provided that the requisite elements of the tort were satisfied. The learned judge went on to deal with the theory of rescuers and concluded that it embraced activities which might not traditionally be associated with the word "rescue". As such, searchers who were involved in a long drawn out operation to search for the injured or the dead ought to be also included in the theory of rescuers.[45] However,

[40] *Ibid*, at 550, *per* Rose LJ.

[41] *Ibid*, at 551-552. He found that the although the rest of the officers were on duty, they were not within the area of risk of physical or psychiatric injury when the incident occurred.

[42] *Ibid*, at 552.

[43] *Ibid*, at 567.

[44] *Ibid*, at 568

[45] He found support in the dissenting speech of Evatt J in *Chester* v *Waverley Corp* (1939) 62 CLR 1 and Lord Wright's speech in *Bourhill* v *Young, supra*, note 12. In *Chester*, the plaintiff was a mother whose seven-year-old child had failed to return home when expected and who, having joined in the search for him, was present when his dead body was found in a flood trench. The High Court of Australia by a majority rejected her claim for damages

Judge LJ was of the opinion that the fact that the claimant could effectively bring himself within the legal definition of rescuers did not necessarily mean that he should automatically be considered a primary victim of the defendant's negligence and so entitled to recovery. The learned judge was seemingly concerned that although the claimants in *Alcock* could technically be considered "rescuers and searchers",[46] the Law Lords found that they were in fact "secondary victims" who failed to establish the requisite degree of proximity. The only logical conclusion to be drawn from this apparent inconsistency was that some rescuers would be primary victims whilst others would not.[47] Each must be assessed on the facts of the case. With respect, Judge LJ's arguments although attractive, inject too much uncertainties in an area which is already fraught with difficulties. Rescuers are either primary victims or they are not. There is no room for in-betweens.

III. The Position after *Frost*

So where does *Frost* leave us? As can be clearly seen from the case, a plaintiff may be subject to different tests depending on whose definition of primary victim is being used to determine liability. In view of this discrepancy, it is submitted that there are really two approaches which the courts in future can adopt.

The first approach is to restrict Lord Lloyd's definition of a primary victim to its facts such that it only applies to road accident cases. Under this approach, Lord Oliver's definition of a participant will determine whether a plaintiff needs to fulfil the proximity requirements besides satisfying the basic foreseeability test. Therefore, in the case of a rescuer, proximity is assumed. It is sufficient that the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. Lord Oliver did not talk about a situation where there exists a master and servant relationship between the plaintiff and the defendant. It is submitted that Lord Oliver's categories are not exhaustive and that the basis of the test as to whether a plaintiff should be exempted from the requirements imposed on secondary victims still lies in the Lordship's

as a result of nervous shock. This case has been criticised by Lord Wilberforce in *McLoughlin* as falling "on the other side of a recognisable line": *supra*, note 8, at 305. Lord Bridge in *McLoughlin* was also of the opinion that the "manifest injustice of the result" of *Chester* might have led to the intervention of the New South Wales legislature: *supra*, note 8, at 317. With respect, a careful reading of the relevant speeches does not reveal that Evatt J and Lord Wright have gone so far as to equate "searchers" with "rescuers".

46 The claimants in *Alcock* did not pursue this course of action.

47 *Supra*, note 13, at 573.

definition of participant or primary victim. However, the problem with this approach is that the definition itself carries with it too many subjective yardsticks. Words like "involved", "mediately or immediately" and "passive" themselves require further clarification before any application of the definition can be meaningful.

The second approach is to take Lord Lloyd's definition of a primary victim at face value such that Lord Oliver's categories of participant should be reviewed in the light of *Page* v *Smith*. Under this approach, only a person who was within the area of physical impact of the defendant's negligence would be a primary victim. Those who do not qualify would be regarded as secondary victims and would have to satisfy the proximity requirements before being allowed to claim. For instance, using Lord Lloyd's definition of a primary victim, a rescuer who comes on the scene of the incident would not be within the area of physical impact, and should rightfully belong to the category of secondary victims. In order to recover damages for psychiatric injuries, the rescuer must satisfy the requirement of proximity. However, unlike the other category of parents and spouse, whose claimants satisfy the requirement of proximity in being in a relationship of love and affection, rescuers do not have any blood relations with the victims. Therefore, separate considerations regarding proximity would have to be taken when dealing with secondary victims other than parents and spouse. In the case of a rescuer, it may be extremely important that he establishes that he was actively involved in the rescue process which in turn brings him into a proximate relationship with the defendant such that a duty of care would be owed by the defendant to the rescuer. He will, in addition, have to satisfy proximity with regard to time and space. The problem with this approach is that the definition of primary victim is too restrictive and most of the time the court will still have to go through the control mechanisms to determine whether a secondary victim can be allowed to recover. In addition, it can be argued that Lord Lloyd did not have in mind the rescue cases nor the employee cases such as the *Frost* type of situation when he laid down the definition of a primary victim. However, the advantage of the definition is that it is straight forward and who is a primary victim can be easily identified. In view of this, it is submitted that this is the preferred approach. Under this approach, who is a rescuer becomes important as its classification automatically means that proximity of relationship is satisfied. Employees can be either a primary victim or a secondary victim depending on the circumstances upon which the nervous shock arise. This will be discussed in the later part of this article.

A. *Rescuers*

The definition of who is a rescuer in the eyes of the law is surprisingly not entirely clear even though rescuers' cases have had a relatively long

history. Courts before *Frost* did not attempt to lay down any guidelines as to who would come within the ambit of the definition of a rescuer. Although Rose LJ in *Frost* listed some factors to be considered when deciding whether a plaintiff is a rescuer,[48] he did not explain how these factors should apply. It is therefore necessary to turn to the authorities to see if a definition can be found for a rescuer. An analysis of the relevant cases shows that the following elements are generally required to be present before one can be considered a rescuer in law:

1. the circumstances surrounding the incidents generally gave rise to a situation of danger or an emergency;
2. the rescuer was himself exposed to the risk of adverse physical or psychiatric repercussions; and
3. the rescuer was actually involved or participated in the rescue process.

1. *A situation of danger or emergency*

The requirement that there must be some danger or emergency[49] is necessary to determine whether the conduct of the rescuer was reasonable

[48] *Ibid*, at 550.

[49] In *Haynes* v *Harwood*, *supra*, note 2, the defendants' two horses were left unattended in a busy London street where they were provoked and started to runaway. The plaintiff, a policeman, saw the runaway horses and that there were a woman and some children in grave danger if nothing was done to arrest the progress of the horses. He thus tried to stop the horses but was himself seriously injured in so doing.
In *Videan* v *British Transport Commission* [1963] 2 QB 650, a power-driven trolley was coming towards a child on a railway track at considerable speed and the driver did not see the child until it was too late. The plaintiff leapt from the platform on to the track in the path of the trolley in a desperate effort to save the child, and in doing so was himself killed instantly.
In *Chadwick* v *British Railways Board, supra*, note 10, a very serious railway accident happened at some 200 yards from the plaintiff's home and he immediately went to the scene of the accident to help the survivors, many of which were still trapped in the rubbles. As the plaintiff was small in stature, he was asked to crawl into the train wreckage to administer injections to injured persons and to aid persons to extricate themselves from the wreckage. He became psychoneurotic as a result of his experiences.
Thus, the lack of a dangerous situation was probably why the plaintiff in *Cutler* v *United Dairies (London) Ltd* [1933] 2 KB 297, failed in his claim. In this case, the defendants' horse ran past the plaintiff's house without a driver. Fearing the safety of his children, he went to check on his children and found them playing quite safely. The plaintiff then saw the horse in a field nearby with its driver trying to pacify it. In response to the driver's call for help, the plaintiff tried to hold the horse's head, but was injured in the process. Although the English courts at that time were still trying to reconcile the idea of rescue

in the circumstances. If the plaintiff's injuries were sustained by his foolhardy exposure to an unnecessary risk, then he cannot claim.[50] Having said this, however, there does not seem to be a requirement that actual danger be proved.[51] It is sufficient if the rescuer reasonably believes that someone is in danger or in a state of emergency that requires prompt attention.

The magnitude of the danger as to whether it warrants a rescue is to be determined on an objective basis. It should not be determined by the type of rescuer who is rendering the rescue. The courts, for instance, have rejected arguments that firemen should only be allowed to claim for injuries suffered as a result of exposure to "exceptional" risk.[52] Therefore, as long as the defendant has, by his negligent action, put someone in danger which invites rescue, he will owe a duty to anyone who may come forward to answer the cry of distress.

with the notion of *volenti non fit injuiria*, it is doubtful whether the case on its facts would be decided differently today. Greer LJ in *Haynes* v *Harwood, supra*, note 2, at 157 distinguished *Cutler* on the ground that "it could not be said that the injured man was doing what he did in order to rescue anybody from danger". As Roche LJ remarked, *ibid*, at 167, the horse there in question was not at the material time running away and was not upon a highway, but had come to a stop in an enclosed field and had apparently ceased to be a danger.

50 For instance, see *Cutler* v *United Dairies, ibid.* See also the *obiter* of Lord Bridge in *Ogwo* v *Taylor, supra*, note 5, at 965.

51 See Linden, "Rescuers and Good Samaritans" 34 MLR 241, at 256. Professor Linden cited the case *Ould* v *Buttler's Wharf* [1953] 2 Lloyd's Rep 44 to substantiate his view on this point. Although a careful reading of *Ould* would reveal that Gorman J in that case, at 46, ruled on the facts that there was an "imminent serious accident" to the co-worker, *ie*, there was an *actual* danger, Professor Linden's proposition is sound according to the general principle of a reasonable man.

52 *Ogwo* v *Taylor, supra*, note 5. In this case, the defendant negligently started fire by using a blowlamp to burn off the paint on the fascia board under the eaves of his house thereby causing the roof timbers to catch fire. The plaintiff, a fireman, went into the roof space to tackle the fire and sustained serious injuries from steam generated by water poured onto the fire, notwithstanding that he was wearing standard protective clothing. There was no suggestion that the contents of the roof space were unusually combustible or that there was any special danger from some hidden cause. The defendant tried to argue that negligence in starting a fire to which the fire brigade have to be called can never, *per se*, be sufficient to establish liability in damages to a fireman injured by a hazard of a kind to which the inherent dangers of the fireman's profession necessarily subject him. There must always be some extraneous or exceptional feature in the circumstances of the fire which imposes an additional hazard for which the tortfeasor can be held responsible. The House of Lord unanimously rejected the defendant's argument. Lord Bridge said that "fire out of control is inherently dangerous" and that the firemen would be exposed to risks, whether exceptional or ordinary, even if they exercised all their professional skills. There was no reason why

2. E*xposure to the risk of adverse physical or psychiatric repercussions*

In all the rescuer cases, the rescuer was generally exposed to the risk of adverse physical and/or psychiatric harms as a result of his involvement in the rescue process.[53] The plaintiff in *Chadwick* v *BRC*,[54] while helping out in the rescue operation, witnessed grotesque injures such as victims with severely lacerated legs and dead bodies impaled on girders. In *Frost*, the police officers had to attend to victims that were "blue, cyanotic, incontinent; their mouths open, vomiting; their eyes staring".[55] The courts have not expressed any opinion on the magnitude or gravity of the accident required to be considered sufficient to cause legally recognised psychiatric illness. There are some authorities that seem to demand that the accident must be of a severe kind,[56] so that the scene witnessed by the rescuer could properly be called "gruesome",[57] "grisly"[58] *etc*. Most of the time, the facts of the cases support this point. However, there are also authorities which suggest that there is no need that the accident should be a catastrophe before a rescuer is allowed to claim.[59]

there should be any difference in risks depending on the type of rescuers.

53 In *Haynes* v *Harwood, supra*, note 2, the plaintiff, "at great risk to his life and limb", tried to seize the running horse. In *Videan* v *British Transport Commission, supra*, note 49, the plaintiff leapt from the platform on to the track in the path of an on coming trolley in a desperate effort to save his child. In Lord Denning's words, the plaintiff was someone that was "impelled [by the defendant's action] to expose himself to danger in order to effect a rescue".

54 *Supra*, note 10.

55 As described by Taylor LJ in his interim report on the disaster. See *Frost*, *supra*, note 13, at 544.

56 For instance, Lord Wilberforce in *McLoughlin* v *O'Brian* said that it should be "a serious accident involving people", *supra*, note 8, at 302. Therefore, it would rule out catastrophic accidents involving animals which may cause nervous shock to animal lovers. He also thought that an ordinary person "must be assumed to be possessed of fortitude sufficient to enable [him] to endure the calamities of modern life," *supra*, note 8, at 304.

57 *Per* Waller J in *Chadwick* v *BTC, supra*, note 10, at 951.

58 *Per* Menzies J in *Mount Isa Mines Ltd* v *Pusey* (1970) 125 CLR 383 at 392.

59 For instance, in the Australian case *Mount Isa Mines Ltd* v *Pusey, ibid*, two employees of the defendant who were testing a switch-board were severely burnt by an intense electric arc. The short circuit caused a loud explosion and the plaintiff, who was working on the floor below, rushed to the scene and found one of the victims "just burnt up" before his eyes. The victim's clothes were burnt off, his skin was peeling and he was grievously hurt. The plaintiff assisted in carrying him to an ambulance. The victim whom he aided died nine days later. The plaintiff subsequently developed schizophrenia. The Australian High

3. *Actual involvement in the Rescue Process*

The English courts have insisted that the rescuer must actually be involved in the rescue process before he can claim for psychiatric damages suffered as a result of the horrific experience. It is clear that a person, unrelated to the victim, who was a mere bystander or witness of horrific events and nothing more could not recover.[60] This distinction between an active participant and a mere bystander of a rescue process was also clearly noted in *McFarlene* v *EE Caledonia Ltd.*[61] Although this conservative approach has been criticised by academics and writers[62] and the courts have expressed the possibility of extending recovery to persons outside the usual categories of claimants if the circumstances warrant it,[63] no concrete step towards such reformation has taken place to date.

Even if recovery is limited to persons actually involved in the rescue process, the next question to ask is the extent of involvement required before a person can be classified as a "rescuer" in the legal sense. From *McFarlene*, it is clear that being at the accident scene and rendering some minor help to the victims is not sufficient to make one a rescuer. However, the distinction as to what is a major involvement as opposed to an insignificant act may be very thin. Helping to move blankets and assisting the victims as they arrive to a safe place may not be adequate but crawling through wreckage to administer injections to injured victims has been held to be sufficient.[64]

Court held that the defendant was liable for the plaintiff's psychiatric injuries.

60 *Bourhill* v *Young, supra,* note 12.

61 [1994] 2 All ER 1. In this case, the plaintiff was a painter on board an oil rig owned and operated by the defendants. One night, while the plaintiff was off duty and resting on his bunk on a support vessel nearby, a series of massive explosions occurred on the rig. The plaintiff witnessed the explosions and consequent destruction of the rig for the next one hour and three-quarters before he was evacuated by helicopter. The accident claimed the lives of 164 men. The closest the plaintiff came to the fire was 100 metres when the support vessel he was on moved in towards the rig in an attempt to fight the fire and render assistance. The plaintiff subsequently bought an action against the defendants claiming damages for psychiatric illness suffered as a result of the events he had witnessed. The English Court of Appeal did not think that the plaintiff qualified as a rescuer, although he did help to move blankets with a view to preparing the heli-hanger to receive casualties and assisted two walking injured as they arrived on the support vessel he was on. Stuart-Smith LJ said that the plaintiff was "never actively involved in the [rescue] operation".

62 See Mullany and Handford, *Tort Liability For Psychiatric Damage* (1993), at 128-133.

63 See the various Lordships' *dicta* in *Alcock*, *supra*, note 12.

64 A quite bizarre case bordering on the extreme is the Canadian case of *Bechard* v *Haliburton Estate*, (1991) 84 DLR (4th) 668. In this case, as a result of colliding with a car in which the plaintiff was a passenger, a motorcyclist was injured and thrown into the middle of the road. Just at this time, the defendant drove his car fast approaching the motorcyclist. The

B. *Employees*

Employees can be classified as a primary victim or a secondary victim according to the circumstances which give rise to the nervous shock. In work-induced psychiatric illness cases such as *Gillespie* v *Commonwealth of Australia*,[65] *Johnstone* v *Bloomsbury Health Authority*,[66] *Petch* v *Customs and Excise Commissioners*[67] and *Walker* v *Northumberland County Council*,[68] the employee concerned suffered mental breakdown because of the stress imposed by the sheer amount of work given by the employer. Using Lord Lloyd's definition, the employee in such a circumstance is within the area of physical or psychiatric impact of the employer's negligence and thus a primary victim.[69] However, in situations like *Frost*, as rightly pointed out by Henry LJ, the employee should be a secondary victim. The existence of an employer/employee or master and servant relationship would provide the requisite proximity. The employee, however, will have to satisfy proximity in time and space before he can be successful in his claim.

In this light, as pointed out by Henry LJ in *Frost*, the fact that the plaintiff was off duty when the incident happened was probably why the plaintiff in *McFarlene* v *EE Caledonia Ltd*[70] did not try to base his claim on an employer/employee relationship. Even if he was on duty, if a plaintiff cannot prove that he was sufficient close in time and space with the primary victim, he cannot be allowed to claim as seen in the appeal of *Duncan* v *British Coal Corp*.[71]

plaintiff tried to warn the defendant by screaming and waving her arms. However, the defendant paid not heed and drove over the injured motorcyclist, killing the latter. The plaintiff suffered nervous shock as a result of the whole experience. The Canadian court held that the plaintiff was entitled to recover based upon the general rescue principle in that she was performing a role analogous to that of a rescuer when she tried to present the motorcyclist from further injury.

65 1991 (104) ACTR 1, Supreme Court of the Australian Capital Territory.

66 [1991] 2 All ER 293, CA.

67 [1993] ICR 789.

68 [1995] 1 All ER 737.

69 A detailed discussion on this topic is outside the scope of this article. For a recent review on the cases cited, see Leong and Ter's article, *supra*, note 6.

70 [1994] 2 All ER 1.

71 [1997] 1 All ER 540. This was the second appeal which came before the same Court of Appeal in *Frost*. In this case, the appellant was a pit deputy at a colliery when one of the men for whom he was responsible was crushed to death at the coal face. The appellant was about 275 metres away at the time, and arrived at the scene of the accident within four minutes. By then the victim was apparently already dead. There was no sign of injury or blood. He had no pulse and made no noise. The appellant's attempts to revive him were unsuccessful. The appellant subsequently developed a psychiatric illness and brought a claim against his employer who operated the colliery. The judge at the lower court dismissed the

IV. Conclusion

The boundaries of claim in the area of nervous shock have since the time of *Dulieu* v *White*[72] expanded, albeit in an incremental manner, to accommodate more categories of claims. The courts have also displayed a willingness to keep abreast with advances in science when they treat psychiatric injuries in the same light as physical injuries as seen in *Page*. Nevertheless, the legal principles concerning the ambits of liability in nervous shock cases remain complex and difficult in their applications.[73]

The decision of the Court of Appeal in *Frost* is fair as far as the facts of the case are concerned. It is also commendable that the judges in the majority had spared no efforts in attempting to apply the principles enunciated by the Law Lords. In so doing, however, it is humbly submitted that the fundamental issue of who is a participant/primary victim did not receive sufficient deliberation from the judges. In fact, it is unfortunate that the judges, although given the opportunity, did not reconcile the two differing definitions of a participant/primary victim. It is hoped that courts in future, in their unrelenting quest for clearer and more settled legal principles, will pick up from where *Frost* has left off. Till then, the law in this area remains much in need of being "rescued".

Lan Luh Luh*
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claim, holding that although the plaintiff had suffered a harrowing experience, what he had seen was an inanimate body which was no more than might be encountered at a road accident or the like which would not have affected a man of reasonable fortitude to the extent that the appellant had been affected. The Court of Appeal affirmed the lower court's decision and dismissed the appeal.

72 [1901] 2 KB 669. In this case, the law allowed a claim for nervous shock produced by fear of immediate personal injury to oneself.

73 This has probably prompted the Law Commission in UK to propose legal reforms in this area as seen in the Law Commission Consultation Paper No 137, *Liability for Psychiatric Illness*.

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