Frost: more confusion and unfairness in psychiatric injury claims?

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Introduction

On 15 April 1989 at the Hillsborough football ground in Sheffield, the FA Cup semi-final match was due to take place when the South Yorkshire police, which was responsible for crowd control, allowed too many spectators into the Leppings Lane end of the ground. As a result, they were all crammed into pens 3 and 4 below the West Stand causing 95 spectators to be crushed to death, and another 400 or so to be injured. Brian Harrison was at the ground in the West Stand. He knew that both of his brothers were in the pens below, and he watched the scene unfold. It was clear that people were being killed and injured. He searched unsuccessfully for his brothers, and then sat up all night waiting for news. At 11 am the following morning he was told that his brothers were dead. He suffered psychiatric injury as a result. His was one of the cases considered in *Alcock v Chief Constable of South Yorkshire Police*.[1] Police Constable Glave was on duty in the gymnasium where the bodies were brought. He helped to move bodies and was on duty until 1.30 am the next morning. The dead and injured were unknown to him. PC Glave suffered psychiatric injury, and his was one of the cases considered by the Court of Appeal in *Frost v Chief Constable of South Yorkshire Police*.[2] PC Glave was successful. Brian Harrison was not, as he failed to establish a sufficiently close relationship with his brothers, and Lord Oliver held that he had not been exposed to a sufficiently shocking perception of the event.[3] What is the difference between the two cases?

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1 [1992] 1 AC 310.

2 [1997] 1 All ER 540.

3 *Supra* n 1 at 417.

Although in *Frost*, three of the successful appellants were found to be rescuers, PC Glave, who was not a rescuer, nevertheless succeeded, because, due to the negligence of his employer, he had been exposed to the horror of the events.

This article seeks to examine questions raised by the differences between the principles of law employed in the respective cases of Brian Harrison and PC Glave, and will argue that, despite the difference in approach, the old 'nervous shock' restrictions are alive and well and operating in *Frost*, and further muddying the murky waters of psychiatric injury claims.

Legal principles - 'nervous shock'

Although the expression 'nervous shock' is anachronistic, it is useful as shorthand to describe negligently inflicted psychiatric illness, when there is no pre-existing relationship between the defendant and the plaintiff, and is used here accordingly.

Primary and secondary victims

The special restrictions in nervous shock claims have developed due to the conceptual wrangles around the concept of 'proximity'[4] and this has led to a distinction between primary and secondary victims. A primary victim is either someone who is physically injured or is within the range of foreseeable physical injury.[5] If the plaintiff can bring herself into the category of a primary victim, then, subject to proving causation and showing that she is suffering from a recognised psychiatric condition, she will succeed in recovering damages. A secondary victim is necessarily outside the range of foreseeable physical injury. Her psychiatric injury has been caused because of what has happened to a primary victim. In order to succeed, the secondary victim must satisfy three criteria. First, she must be physically close to the

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4 Regarded as being part of the criteria of a duty of care in *Donoghue v Stevenson* [1932] AC 562, at 580, and see the subsequent principal negligence cases such as *Caparo Industries plc v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] AC 398.

5 See, for example, *Page v Smith* [1996] AC 155, at 184.

event which has damaged or threatened the primary victim,[6] which event must make a sudden impact on her unaided senses (the 'impact' rule); secondly, she must have close ties of love and affection with the primary victim,[7] and thirdly, the event must be one that is shocking to a person of normal fortitude (the 'fortitude' rule).[8] These criteria have been the subject of much academic criticism and accused of reflecting unjust policy considerations.[9]

Rescuers

Rescuers are a special category of victim because although they may be primary victims within the range of foreseeable physical injury, even if they are not and have no close ties with any of the primary victims, they can succeed.[10] This is generally regarded as being based upon policy, and this is examined further below. As far as professional rescuers are concerned it has been established in the House of Lords that they can recover for negligently-inflicted physical injury,[11] but *Frost* was the first opportunity for an English court to consider liability for psychiatric injury (although other police officers involved at Hillsborough who clearly came within the category of rescuer had their claims settled, as did some of the King's Cross firefighters).

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6 This means being present at the event or its immediate aftermath - *McLoughlin v O'Brian* [1983] 1 AC 410.

7 *Supra* n 1.

8 *Bourhill v Young* [1943] AC 92.

9 See, for example, Michael A Jones, Liability for Psychiatric Illness - More Principle, Less Subtlety? [1995] 4 Web JCLI, where the restrictions are described as 'wholly artificial and arbitrary', and Harvey Teff, The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage, [1996] *Tort Law Review*, Vol 4, No 1, 45.

10 See *Chadwick v British Railways Board* [1967] 1 WLR 912, approved in *McLoughlin v O'Brian* [1983] 1 AC 410.

11 *Ogwo v Taylor* [1988] AC 431.

Legal Principles - Employers' Liability

Although police officers are not employees,[12] the relationship between the Chief Constable and his officers is analogous to that of master and servant and there was no dispute in *Frost* that the principles of employers' liability could apply without modification.

The law in this area is a species of the law of negligence, and encompasses a personal duty on the part of an employer to care for the health and safety of its employees,[13] and strict vicarious liability for the primary negligence of employees, ie regardless of want of care on the part of the employer.[14] In *Frost* there was no discussion of these two aspects, and nothing turned on whether the breach was of the employer's primary duty of care, or whether the liability was a vicarious one in respect of the negligence of one or more of the police officers who mismanaged the football crowd on that day. No doubt this reflects the fact that in both cases (employer/ employee, employee/fellow employee), there exists a prior duty of care. However, it is likely on the facts that the liability was vicarious.[15] This article will argue that when one considers this case from the point of view of vicarious liability and compares it with the nervous shock cases, it results in inconsistency, illogicality and injustice.

Proximity and employers' liability

The duty of care owed to employees, whether primary or vicariously, is an established duty which exists by virtue of the employment relationship. It might be thought that in the light of this, there is no place for consideration of the concept of proximity as this is used to decide whether a duty of care was owed in the first place. However, the damage resulting from the breach must

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12 *Fisher v Oldham Corpn* [1930] 2 KB 364.

13 *Wilsons and Clyde Coal Ltd v English* [1938] AC 57.

14 As far as the police are concerned, the vicarious liability of a Chief Constable for the acts of his officers in the purported execution of their duty is in statutory form in section 48 of the Police Act 1964.

15 See for example the observations of Judge LJ at 574, *supra* n 2.

be reasonably foreseeable.[16] This will be related to the obligations arising out of the contract of employment, one of which is the employer's implied duty to care for the health and safety of the employee, which includes employees' mental health.[17] The duty of the employer will be definable by reference to the general principles of negligence. Consequently, the concept of proximity may be relevant to consideration of foreseeability, not of any damage resulting, but the particular type of damage such as psychiatric injury.[18]

In his judgment Rose LJ brings in proximity in the following way: 'The standard of care required in the discharge of that duty and the degree of proximity will of course vary from case to case according, among other matters, to the nature of the job and the degree of fortitude to be expected of the employee.'[19] The proximity requirement, therefore, is satisfied by reference to the fortitude which it would be appropriate for an employee to possess, depending upon the nature of the duties. Thus, the nervous shock notions of 'impact' and 'fortitude' are being applied.

Summary of the decision in Frost

The principles of law applied by Lord Justices Rose and Henry can be summarised as follows. First, there is a duty to both civilian and professional rescuers. Secondly, in *Page v Smith*[20] Lord Lloyd's categorisation of primary and secondary victims and the requirement that there be foreseeability of psychiatric injury in the case of secondary victims did not apply in the present case as his categorisation did not have rescue cases in mind. Thirdly, the purpose of distinguishing between primary and secondary victims is to apply limiting criteria to the latter, which do not have to be applied when there is a

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16 See, for example, *Paris v Stepney Borough Council* [1951] AC 367.

17 See *Walker v Northumberland County Council* [1995] 1 All ER 737.

18 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co, The Wagon Mound* [1961] AC 388; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617.

19 *Supra* n 2, at 550.

20 *Supra* n 5.

pre-existing duty of care owed - here, by virtue of the master and servant relationship.

Applying these principles to the plaintiffs, one of them, Sergeant Smith, failed in her appeal because she was not on duty at the football ground at the time but attended at the hospital mortuary stripping bodies and dealing with relatives. She did not succeed as she was not a rescuer and was not at the ground when the incident occurred. It was said that no duty was owed to her, presumably meaning no duty in respect of psychiatric injury. The circumstances of PC Glave have already been outlined: he succeeded because, although not a rescuer, he had been exposed to the 'horror of the event'. Anthony Bevis and Mark Bairstow both attempted to revive bodies. They succeeded as rescuers participating in the immediate aftermath of the event. Inspector White pulled people out of the congestion and joined a line of officers passing the dead and injured from the pens. He succeeded both as a rescuer and as an employee within the area of risk.

Judge LJ, dissenting, accepted the rescue principle but said that not all rescuers are entitled to recover because some are primary victims (at risk of physical injury), and others are secondary victims. The case of *Knightley v Johns*[21] had been cited in support of the plaintiffs. This was the case of a police officer physically injured in a road accident as a result of a police inspector's negligence. Judge LJ accepted the correctness of the decision because the officer was a primary victim in the area of physical risk. If his injuries had been psychiatric rather than physical he would have succeeded. Judge LJ did not accept that employees are automatically primary victims by virtue of the employment relationship.[22]

At the same time as the *Frost* appeals, the court considered the case of *Duncan v British Coal Corporation.*[23] The employee was a pit deputy at a colliery when one of his men was crushed to death at the coal face as a result of the employer's negligence. The plaintiff was 275 metres away and arrived at the scene within four minutes. He spent some considerable time trying to revive the man. In a unanimous decision the court rejected his claim. Rose

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[21] [1982] 1 WLR 349.

[22] *Supra* n 2, at 574-575.

[23] *Supra* n 2.

LJ said that, although he was 'proximate in time', he was not 'geographically proximate' when the incident occurred, and that, when he arrived there was no danger to him or the deceased. Rose LJ went on to say that the first aid that he rendered was 'plainly within the scope of his employment'.[24]

Frost raises considerable disquiet about the unfair contrast between the cases of the police officers and those of the relatives of Hillsborough victims who failed in their claims. This was alluded to in the dissenting judgment of Judge LJ, who expressed the view that the same sorts of nervous shock control mechanisms should apply to both types of plaintiff.[25] The majority decision however seems to be an attempt to avoid the embarrassment of the contrast between the two sets of victims, by appearing not to deploy the principles used in nervous shock cases at all. By placing the officers in the category of employees the disparity issue could to some extent be avoided. After all, how many other cases are likely to arise when the shocking event itself has been caused by the professional rescuers involved? Henry LJ was at pains to point out that the disparity between the success of the police officers and the failure of the relatives was brought about by the application of different principles of law, and not by favouritism towards police officers.[26] Nevertheless, although on the face of it, there appears to be no need for control mechanisms to be deployed in the *Frost* case, an examination of the majority judgments shows that such mechanisms are being used in the context of employers' liability, albeit in a different way. The artificial concepts used in nervous shock in the form of impact and fortitude permeate the decision.

Issues raised by Frost and Duncan

First, what, if any, are the implications for the primary/secondary victim distinction? Secondly, how are the fortitude and impact rules applied? Thirdly, what are the implications for the way in which we regard rescuers? Fourthly, do the cases have some unacceptable implications if one considers them in the light of employers' vicarious liability? Finally, as the disparity

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[24] *Supra* n 2, at 454.

[25] *Supra* n 2, at 572.

[26] *Supra* n 2, at 568.

between the cases of Brian Harrison and PC Glave gives cause for concern, could a more coherent result be constructed whilst still remaining within the present framework of the law?

Primary/secondary victims

The dissenter, Judge LJ, maintains the primary/secondary distinction, but said that these officers were not primary victims because they were not at risk.[27] He distinguishes *Chadwick v British Railways Board*[28] by stating that there, the plaintiff was at risk. However, it is clear from that case that personal risk was not the basis of the decision, and this was acknowledged by the House of Lords in *McLoughlin v O'Brian*.[29]

Rose LJ stated that the primary/secondary distinction is unnecessary in employers' liability.[30] If so, what are we to make of his statement that liability arose in this case because the officers were exposed to the risk of physical or psychiatric injury? If the risk was of psychiatric injury alone, then there could only be such a risk because of the 'impact' rule. Doubting its correctness, Rose LJ refers to the case of *Robertson v Forth Road Bridge Joint Board*[31] where an employee failed to recover damages for psychiatric injury caused by witnessing the death of his fellow employee who was blown over the Forth Road Bridge as a result of the employer's negligence. He failed as he was found to be a bystander and, as such, the employer's duty of care extended no further than the general duty to non-employee bystanders. Henry LJ is not so critical of the decision in *Robertson*, because as the event was over so quickly, there may have been no time to 'participate' in it. The implication of Henry LJ's statement is that in order to participate in an event it must have a minimum temporal duration. This is hard to reconcile with *Page v Smith*,

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27 *Supra* n 2, at 576.

28 *Supra* n 10.

29 [1983] AC 410 at 419.

30 *Supra* n 2, at 576.

31 [1995] SLT 263, Ct of Sess.

where the circumstances concerned a simple car collision, which probably took no longer than the event in *Robertson.* Certainly, the degree of temporality does not help in framing a definition. In *Alcock*[32] Lord Oliver referred to a primary victim as being 'involved either mediately or immediately' as a participant, which suggests a slightly wider interpretation and, in any event, does not imply a required minimum duration. Similarly, to require some form of active participation in terms of 'doing something', again, means that Mrs Dulieu, who saw the horse van coming through the window of the public house, would not have been the primary victim that she clearly was.[33]

It may be argued that the rejection of the primary/secondary victim distinction in *Frost* was simply another way of saying that the restrictions which give rise to the distinction in nervous shock cases do not apply here. But that cannot be the case. Certain aspects of those rules are thought to be relevant, namely the rules relating to impact and fortitude, the latter leading to a distinction between two types of primary victim.

The 'Fortitude' Rule

There is a strong argument that the Court of Appeal's decision is based upon an attempt to avoid a direct confrontation with the public policy issues in allowing professional rescuers to recover damages for psychiatric injury. However, Rose LJ stated quite clearly that professional rescuers can recover: 'The only difference between professional and non-professional rescuers is that the former are more hardened and therefore it may be more difficult to foresee psychiatric injury to them, but this does not change the scope of the duty owed.'[34] By stressing the normal fortitude rule, was the court hoping that, in dealing with foreseeability of psychiatric injury at the breach stage, this would avoid any public policy issues which could have arisen in the prior stage of the establishment of a duty of care?

Certainly *Frost* suggests that there can be two types of primary victim -

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32 *Supra* n 1, at 407.

33 *Dulieu v White & Sons* [1901] 2 KB 669.

34 *Supra* n 2, at 546.

those who must possess some degree of normal fortitude (eg employees such as police officers) and those who need not (plaintiffs in no pre-existing relationship giving rise to a duty of care, such as the plaintiff in *Page v Smith*). Rose LJ refers to the concept of normal fortitude as applying to a primary victim:

> 'Once it is accepted that there is no justification for regarding physical and psychiatric injuries as different kinds of injury, when an employer negligently causes physical injury to one employee, it seems to me to be impossible to contend that he is not equally liable to a fellow employee of normal fortitude working on the same task who sustains psychiatric injury, whether through fear for himself or through witnessing what happens to his fellow workman'.[35]

It could be argued that the reference to normal fortitude in *Frost* was another way of saying that it would not have been foreseeable by the employer that psychiatric damage would have resulted unless the event was such as to cause psychiatric injury in one of normal fortitude. However, that is precisely what the normal fortitude rule is about outside the context of employers' liability. In *Page v Smith* the foreseeability of physical injury was enough. Is the implication of *Frost* that the duty owed to the officers *qua* employees will vary so that, if the negligent act does not put them at risk physically, then psychiatric injury is unforeseeable? This cannot be the case because it does not square with the judgment of Rose LJ referring to those being within the area of risk of physical or psychiatric injury, and his conclusion that liability arises because of exposure to the horror. Further, if they are found to be at risk of psychiatric injury only, then (and this is one of the controversial aspects of the decision), they are in a better position than a bystander. The suggestion by Henry LJ that this can be countered by the fact that those who were there carrying out their duties had no choice but to be there[36] does not meet the objection that non-employees may not have had a choice in the moral sense (eg off-duty professionals and civilian helpers not classifiable as rescuers).

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[35] *Supra* n 2, at 550.

[36] *Supra* n 2, at 560.

The remark by Henry LJ that an off-duty policeman at the match could, if his conscience permitted, have taken no part in the events whatsoever, and gone home with the crowd',[37] (emphasis added) reinforces the objection rather than neutralises it. The clear implication of the 'no choice' argument of Henry LJ is that if a civilian helper had worked along side PC Glave and had been exposed to the same experiences, that civilian's consequent psychiatric injury would not have been compensatable.

However, it is clear from *Frost* that certain types of employee may be expected to have more than 'normal' fortitude: the numbers affected strongly suggest that ordinary police robustness is not protection against an experience such as this (a conclusion that would not surprise the doctors)'.[38] If the issue is approached from the point of view of foreseeability, then not only can the 'normal' fortitude rule be sustained, but more than normal fortitude may be required in certain areas of work. This is consistent with *Walker v Northumberland County Council*.[39] It can be argued that it is simply not foreseeable that psychiatric harm will result. This means that the normal fortitude rule is being used more harshly in employers' liability cases such as this than in cases of nervous shock. It may be thought that this takes the sting out of allowing recovery by professional rescuers. On the contrary, it has had the opposite and highly unpalatable effect: police officers possessed of more than so-called normal fortitude may be compensated in identical circumstances in which civilians deemed to be less resilient and, therefore, more likely to be affected, have not been.

It can be asked whether this - what could be called the 'hardened skull' rule - explains the statement by Rose LJ that the degree of fortitude to be expected from an employee will go to the standard of care.[40] This reference to deciding on the standard of care is all very well in situations where the only victims of the employer's negligence are the employees themselves. However,

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37 *Ibid.*

38 *Supra* n 2, per Henry LJ at 557, and see also the comments of Rose LJ at 551 on the case of DC Hallam being exposed to excessively horrific events such as were likely to cause psychiatric illness even in a police officer.

39 [1995] 1 All ER 737.

40 *Supra* n 2, at 550.

where, as here, there are non-employee victims, it means that different standards of care will apply to the same act of negligence depending upon whether the victim is an employee or not, and this must surely be an affront to common sense.

The 'Impact' Rule

Sergeant Smith was not successful because she did not experience the impact of the event or its immediate aftermath. It was said that she was not within the area of risk, and that what she subsequently did was no more than could properly be asked of any police officer in the ordinary carrying out of her duties following a serious incident.[41]

The case of *Walker v Northumberland County Council*[42] confirmed that damages can be recovered for psychiatric injury when there is no causative 'shocking' event, where the injury was a foreseeable result of an excessive, stressful workload. The plaintiff in that case was not exposed to physical risk, so the physical/psychiatric division was irrelevant. However, the impact rule was used in *Frost*.[43] Clearly, there had to be a causative event but, given the fact that the essence of this case was the emphasis on the employer's pre-existing duty of care, was there any need to use the very restrictive requirements of the nervous shock impact rule to determine liability?

In *Frost*, the case of *Mount Isa Mines v Pusey* was referred to in all the judgments.[44] That case, decided by the High Court of Australia, concerned a plaintiff who, whilst working as an engineer for his defendant employer, heard the sound of an explosion in the same building. He went to the scene and saw one of the two electricians who had been working on a switchboard, severely burnt. He supported the electrician (with whom he was not acquainted) out to an ambulance. As a result, the plaintiff became psychiatrically ill. He

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41 *Supra* n 2, per Rose LJ at 551.

42 [1995] 1 All ER 737.

43 In his judgment, Rose LJ refers to the successful plaintiffs who were not rescuers (Bevis and Bairstow) as being in the 'area of risk': *supra* n 2, at 551-2; and see Henry LJ at 567.

44 [1970] 125 CLR 383.

succeeded in his claim on the basis that it was foreseeable that another employee in the building would go to the scene. Walsh J said that: '...the fact that the respondent was an employee was a relevant fact in deciding whether or not he was a person within "the area of potential danger" or within the area of risk.'[45] The reference to a geographical or spatial area, therefore, is relevant in deciding whether a particular person would be there, or likely to go there. So, if the event takes place at work, or a place where workers are sent (as in *Frost*), then those people will be foreseeable as persons who might be injured. What must be said is that the reference to the 'area of risk' cannot mean only that the plaintiff and the physically afflicted victim must share some sudden, shocking event or its immediate aftermath. It is arguable, however, that both Lord Justices Rose and Henry interpreted it thus, and therefore felt obliged to exclude the claim of Sergeant Smith, who, it was said, did no more than any other police officer would have done following 'a serious incident'.[46] Although the serious incident had been caused by her employer's antecedent negligence, the majority of the judges were applying the 'impact rule' control mechanism used in nervous shock. This is one of the very control mechanisms that Judge LJ, dissenting, said should apply to employees, just as they apply to others (albeit, in his reasoning, by maintaining the primary/secondary victim distinction and placing the police officers in the latter category).

The question arises as to whether it is helpful to carry out this sort of mutation of legal principles. It might be said that in *Frost* Sergeant Smith's case was being approached from a remoteness of damage analysis which applies to all torts and, therefore, it was not an arbitrary blend of concepts from two discrete areas of negligence. This is an attractive way out. But this not referred to by Rose and Henry LJJ. Furthermore, Rose LJ distinguished Smith's case by saying that, as she had not been at the ground at the time, 'she was not therefore within the category of those officers to whom, being within the area of risk when the incident occurred, a duty of care was owed by virtue of the master and servant relationship'[47] (emphasis added). Despite the pre-existing relationship, the test, therefore, was one of duty, not remoteness.

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45 *Supra* n 44, at 412.

46 *Supra* n 2, at 551.

47 *Ibid.*

In the other case considered at the same time as *Frost*, *Duncan v British Coal Corp*, the plaintiff did not succeed because of failure to meet the impact rule. It will be recalled that he was not present when one of his men was crushed, and although he arrived at the scene within four minutes, the lack of geographic proximity was enough to defeat his claim. In *Mount Isa Mines v Pusey*,[48] although there was still some confusion at the time that the plaintiff arrived on the scene of the explosion, in the event he was not endangered, and importantly, it was not suggested that he suffered the injury because of risk of physical injury to himself. Rose LJ describes this as a rescue case. But is there any significant difference between these circumstances and those in *Duncan*?

An explanation of sorts can be provided by looking at the contractual obligations of the employees. In *Mount Isa Mines*, there was no suggestion that the plaintiff went to the scene to carry out duties required of him by his contract of employment. On the other hand, Mr Duncan was required to carry out first aid as part of his job and, as a police officer, Sergeant Smith attended at mortuaries and so on. It could be argued that they failed in their claims because witnessing a nasty event was not within the scope of their employment, but carrying out first aid or other ameliorative duties, as a consequence of that event, was within the scope of it. However, this is a highly speculative interpretation, and does not meet the objection that involvement in such nasty events is within the scope of a professional rescuer's employment.

Rescuers

In *Frost*, Rose and Henry LJJ supported the proposition that rescuers are primary victims,[49] whilst, dissenting, Judge LJ said that sometimes rescuers were primary and sometimes they were secondary victims.[50] According to Judge, rescuers who are primary victims are those who are at risk in some way from the event itself; others may not be at risk but will still be regarded as rescuers. He cites those people who 'search' for victims, such as Brian

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48 *Supra* n 44.

49 *Supra* n 2, at 549; and 563.

50 *Supra* n 2, at 573.

Harrison, as being properly regarded as rescuers. It is difficult to argue against this view, given that the most well-known rescuer case[51] containing the epigrammatic phrase of Cardozo J - 'danger invites rescue' - was just such a 'searcher' case. In that case the plaintiff and his cousin were on one of the defendant's railway cars, when the cousin was thrown from it by the defendant's negligent act. The plaintiff went through the darkness to search for his cousin, and fell and injured himself. Although this case is about physical injury, the principle at the heart of it must surely apply to psychiatric injury too. The plaintiff had been put into a situation by the defendant's negligence whereby he had to choose between his own well-being and that of another. In choosing the latter he is injured. It makes no difference whether the impulse to rescue is instinctive or after due deliberation on the risks involved.[52]

The statement of Judge LJ, that not all rescuers can recover, that is, if they are secondary victim rescuers, and not in fear for themselves, is questionable. The rescuer's claim is a free-standing claim based on an independent right. A rescuer is in a special position because he is owed a duty even if there was no duty owed to the rescuee.[53] This lends much force to the argument that the rescuer is always a primary victim. Further, could it ever be an essential part of the 'rescue principle' that, if there is no fear, then the degree of courage required is less? This sort of interpretation does not apply to physically injured rescuers. They may have no fear, because the degree of danger is not apparent, but if they then suffer physical injury, then the rescue principle allows them to recover damages. The psychiatrically injured rescuer may have no fear for precisely the same reason, that is, nothing in the situation suggests exposure to serious trauma. However, if, say, a body is discovered which is unexpectedly, and horribly mutilated, surely the same principle applies? If not, it would mean that a lesser degree of courage is rewarded in physical injury than in psychiatric injury, which, on any reasoning, must be unacceptable.

It may be asked why Judge LJ perceives the need for two different

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51 *Wagner v International Ry Co* (1921) 232 NY 176, NY Ct of Apps.

52 *Haynes v Harwood* [1935] 1 KB 146, at 158.

53 *Videan v British Transport Commission* [1963] 2 QB 650.

categories of rescuer. He states that it is unfair to treat professional rescuers more favourably than civilian rescuers,[54] and that surely must be right. The judgments of Rose and Henry LJJ state that they are not being treated differently. The advantage given to PC Glave derived from his status as an employee of the tortfeasor. However, this means that there is an unfair distinction between the employee/professional and the civilian. Presumably, the majority judgments are relying on the rarity of such a case as *Frost*, where the emergency services themselves are liable in negligence. Nevertheless, the 'rarity' factor is no justification for bad law.

Employers' Vicarious Liability

The employee's duty of care to her fellow employees is fixed by the general rules of negligence. The employer will simply pick up the vicarious liability for this, regardless of the lack of primary culpability. However, it does not affect the standard of care required of the negligent employee. That this could give rise to difficulties was acknowledged by the High Court in *Mount Isa Mines*, but it was unnecessary to resolve these, because the trial judge had found that there was vicarious and primary liability.[55]

The difficulties envisaged in that case, however, would have been nothing compared with the situation in *Frost*, as in *Mount Isa* all the victims were employees. In contrast, in *Frost* the victims were both members of the public and police officers. The implication of the decision is that, if liability was vicarious, then there was a duty owed by the police officers to their colleagues in respect of psychiatric illness, but there was no duty owed to the members of the crowd who were psychiatrically injured by the very same negligent acts. This is another affront to common sense.

A more coherent classification of plaintiffs?

Negligently inflicted psychiatric injury has given rise to some of the most tortuous reasoning in the law of negligence and, following *Frost*, we are

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[54] *Supra* n 2 at 574.

[55] *Supra* n 44, at 400-401.

now contemplating different kinds of primary victim, different kinds of rescuer and different kinds of fortitude. Furthermore, we are confronted with the absurd situation whereby those with responsibility for safety at a public event owe each other obligations of safety that they do not owe to the public who they are paid to protect. The use of the law of employers' liability has resulted in nothing but confusion and injustice.

In *Mount Isa Mines*, it is true that both McTiernan J and Menzies J stated that the basis of the decision was a breach of an employer's duty of care, and Barwick CJ referred to the employee coming on the scene 'in the course of his employment'. But Barwick CJ's purpose in referring to this was to argue that the employee was in the 'area of foreseeability to be attributed to ... his employer'.[56] Further, the judgments of Windeyer J and Walsh J make it clear that the duty owed is not only the duty of an employer: '...I do not wish to be taken as saying that where a duty of care springs only from foreseeability of harm to a 'neighbour', and not out of a relationship of status or of contract such as master and servant, a different result would follow'.[57] Similarly, Walsh J states:

> '...the liability of the appellant does not rest necessarily upon a duty arising out of the relationship of employer and employee. It rests upon a finding of a duty owed to all persons of whom it might reasonably be anticipated that they might suffer injury (of the relevant kind) and upon a finding that the respondent was such a person.'[58]

On this basis there is no more reason to find that PC Glave might reasonably be anticipated to suffer injury than Brian Harrison.

Furthermore, there must surely be an argument that people like Brian Harrison were not 'voluntary' participants in the events at Hillsborough that afternoon. He was not a bystander in the sense that he was standing some distance away, passively watching something with which he had no direct connection or concern. He was in the midst of that mayhem; his brother was

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[56] *Supra* n 44, at 389.

[57] *Supra* n 44, per Windeyer J, at 404.

[58] *Supra* n 44, at 412.

somewhere in the crowd and he knew him to be at risk. This is acknowledged in the judgment of Judge LJ who says that none of the plaintiffs in *Alcock* could fairly be regarded as mere bystanders or spectators. However, whilst he uses this observation to argue that they were secondary victims, and that not all secondary victims should succeed, it is argued here that because they were not mere bystanders they should have succeeded. The primary/secondary distinction is, after all, only an application of the concept of proximity. In his judgment, Henry LJ states that he prefers the proximity test rather than the primary/secondary labelling test,[59] and it is arguable that the application of the proximity concept means that 'unwilling participants' such as Brian Harrison are not disinterested bystanders. Similarly, a plaintiff as in *McFarlane v EE Caledonia*,[60] would fall into the same category. The definition may be difficult to frame, and would give rise to some hard cases, but that does not mean that there is no discernible distinction between true bystanders and those who are trapped in a situation by their employment or by the human impulse to search for relatives or friends who may be injured. They should not be required to establish a close tie of love and affection with such relatives or friends.

Moreover, consider the additional argument used by Henry LJ in support of allowing the officers' claims. He states that as a matter of public policy the police should be encouraged to promote safe practices:

> 'My emphasis has been on the police officers as direct victims because of the employer/employee relationship. While that duty of care to them is a factor in a case such as this where their employer was negligent, I would expect a duty to be owed to them by any defendant who caused such a disaster as this. Deterrence is part of the public policy behind tort law'.[61] (emphasis added).

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59 *Supra* n 2, at 561.

60 [1994] 2 All ER 1. The plaintiff was on a support vessel 550 metres away from the Piper Alpha oil rig explosion. Although employed by the defendant he was off duty at the time and, although he carried out some helpful tasks, was not found to be a rescuer. In consequence, the Court of Appeal treated him as a mere bystander.

61 *Supra* n 2, at 567.

Although the suggestion is that the police were owed a duty which may not have been owed to others, it is arguable that he was referring to a general duty to all rescuers. However, it is clear that the safe practices, which should be encouraged, are not only about protecting people in the position of police officers. They are also about protecting everyone in attendance at public events where there is a responsibility, paid for by the public and the organisers of those events, for ensuring the safety of those people in attendance. The public policy argument, therefore, has no exclusive relevance to rescuers, professional or otherwise. Moreover, the argument lends support to the view that those who had bought tickets for a peaceful recreational occasion, on the understanding that they would be safe, should not be owed a lesser duty of care than those officers who were paid to be there. It is suggested that the adoption of the 'unwilling participant' category would avoid at least some of these difficulties.

Conclusion

It has not been the purpose of this article to suggest that it was wrong to compensate these police officers. However, the emphasis the majority judgments placed upon the fact that different principles of law were being applied and that police officers were not being singled out for preferential treatment, does nothing to remove the unjust disparity between the decisions in *Alcock* and *Frost*. Furthermore, some of the reasoning in *Frost* only adds to the confusion in an area already filled with artificiality and the arbitrary use of judicial concepts. It is suggested that this unjust farrago might, to some extent, be avoided by a more coherent approach to the duty of care to avoid negligently caused psychiatric injury, so that PC Glave and Brian Harrison fall into the same legal category. If psychiatric injury unaccompanied by physical injury is to be treated differently from physical injury, then, regardless of whether it arises from a pre-existing relationship, there should be parity between claims of victims.

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