THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 112
Record Number: 2020/138
High Court Record Number: 2017/4712P

Donnelly J.

Noonan J.

Binchy J.

BETWEEN/

WARREN HARFORD

PLAINTIFF/RESPONDENT

-AND-

ELECTRICITY SUPPLY BOARD

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 16th day of April, 2021

1. Can damages be recovered for "nervous shock" where there is no sudden calamitous event but rather an appreciation that physical injury has been narrowly avoided and where that appreciation leads to psychiatric injury? That is the essential question arising for determination in this appeal.

Facts

2. The respondent (the plaintiff) is a network technician who, in 2014, had been employed by the appellant (the defendant) for more than twenty years. On Friday the 12th

December 2014, the plaintiff was assigned the task of repairing a public street light at Highfield Road, Rathgar, Dublin 6. A hole in the road had been excavated on the previous day to expose the relevant electrical cables. The plaintiff attended at the locus at about 11 a.m. with a work colleague, Pat Byrne. The intention was to identify an appropriate live cable and to transfer the faulty street light to that cable and restore it to functionality. The appropriate cable for such a street light would be what is described as a low voltage (LV) cable with 400 volts. Such a cable would normally have four cores.

3. The cables were identified by the use of a device which indicates the voltage and that the cable is live. The device that the plaintiff was familiar with normally used for the purpose was called a "grumbler". However, on the day in question, a grumbler was not available to the plaintiff and he was instructed by his supervisor to use a different device called an Ariadna lC1G. The plaintiff was unfamiliar with this device and had never received any training on how to use it. The plaintiff went into the hole and attached the Ariadna to a cable which appeared to be giving him an appropriate signal although he seemed to be getting similar signals from other cables.

4. On the basis that the Ariadna device had identified the correct cable, the plaintiff began to remove various layers of external protection and insulation from the cable. Initially, he had to strip away a type of tin armour on the cable which protects it from shovel impacts. It was evident that this was a very old cable. Below the tin, the cable was wrapped with a type of black cloth with tar and pitch and below that again, there was lead sheeting protecting the cable. The plaintiff removed the lead sheeting and what remained then was a form of paper insulation which he described as "belting papers".

5. The plaintiff confirmed in cross examination that these belting papers comprised insulation material which are impregnated with oil. The belting papers enclose the entire

cable and if they are removed, each individual core has its own papers. The plaintiff made clear in his evidence that he physically handled this cable several times during the course of the morning without adverse effect, clearly indicating that this cable remained at all times insulated.

6. The plaintiff explained that when he got down to the belting papers, the next stage in the process was for him to insert what he called test lamps into the cable for the purpose of confirming that it was live. These test lamps comprise pointed metal probes that pierce through the layers of external insulation and directly contact the cable core. The plaintiff did not have the test lamps with him as he had left them in the van. Accordingly, he started to get out of the hole to fetch the test lamps but said that as he did so, something about the appearance of the cable caught his eye, as he described it, "it didn't look right".

7. As a result, he went back to the cable and "had a feel around" when he then realised that it had three cores, rather than the expected four. This meant that the cable that the plaintiff identified and had been handling was not an LV cable as he believed but rather a medium voltage (MV) cable which carried 10,000 volts. The plaintiff explained that had he applied the test lamps to this cable as intended, he would have been electrocuted and likely suffered death or very serious injury. Accordingly, the plaintiff immediately closed up the site and reported the incident to his superiors.

8. The company Christmas party took place on that same Friday evening and was attended by the plaintiff, presumably, some eight or nine hours after the incident. In evidence, the plaintiff described how he began to ruminate on what had happened at the party thinking "God, that was close. That was too close". He said that he became to feel "a bit off". However, he was able to re-attend work on the following Monday when he

participated in a reconstruction of the incident for the purposes of a follow up investigation by the defendant.

9. Nonetheless he described himself as becoming overwhelmed with intrusive thoughts of what might have happened, being unable to concentrate and getting palpitations and a feeling of weakness. His colleagues told him that he did not look well and he was brought home. He attended his general practitioner the next day, the 16th December, 2014. Thereafter, he remained off work for a period. There is no dispute about the fact that the plaintiff subsequently developed a recognised psychiatric illness. The plaintiff's psychiatrist was of the view that he fulfilled the criteria for a diagnosis of post-traumatic stress disorder. The defendant's psychiatrist disagreed with this diagnosis and considered that the plaintiff was suffering from depression. However, on the basis of either diagnosis, the plaintiff undoubtedly did contract a recognised psychiatric illness.

Judgment of the High Court

10. Prior to the commencement of the trial, the defendant's solicitors wrote to the plaintiff's solicitors in the following terms:

> "For the purposes of these proceedings only we have received instructions to make an admission of negligence. This admission does not extend to matters relating to reasonable foreseeability, causation or remoteness of the alleged personal injuries, loss or damage. Furthermore, issues will remain as to whether any alleged psychiatric injury suffered by your client are capable of giving rise to a valid cause of action and as to whether the Defendant's duty of case *(sic)* at law was such as to allow recoverability of damages in respect of the psychiatric injuries suffered by your client as a result of and in the circumstances of the incident the subject matter of these proceedings."

11. The issue therefore for the High Court to determine was whether the defendant was liable for an injury suffered in the circumstances described. The trial judge held that there was such liability and awarded general damages of €80,000.

12. In her judgment delivered on the 2nd June, 2020 the trial judge set out the factual background and the relevant evidence of each of the witnesses. She set out the legal submissions of the parties which referred to a number of well-known authorities on the question of nervous shock. Under the heading *"*Findings of fact*"*, the judge said (at para. 60): -

> "There is no doubt but that the plaintiff did suffer a shock and that it was the shock of his exposure to a 10,000-kilovolt cable which he had handled and in respect of which he apprehended threatened serious injury at least as a result of direct exposure to live electric cables in this incident."

13. The judgment went on to conclude that the plaintiff's post-traumatic stress disorder and/or depression were induced by the shock of his exposure to the 10,000 kilovolt cable. Although nothing turns on it, it should be noted that while the trial judge described it on several occasions as a 10,000 kilovolt cable, it was in fact a 10,000 volt or 10 kilovolt cable. Of note, at para. 66, the trial judge stated: -

> "The plaintiff certainly apprehended injury if not death to himself in this incident. Given the defendant's clear duty of care not to cause reasonably foreseeable injury in the form of nervous shock to an electrical network technician doing dangerous work and given [the] failure to adequately protect and train the plaintiff in relation to the use of the Ariadne [*sic*] machine which was later removed from use, this was a reasonably foreseeable event."

14. The trial judge's essential finding of fact which underpinned the ultimate award of damages is to be found at para. 73: -

> "The event which occurred which was [a] horrifying one to him, viewed in its entirety and which he perceived by sight caused him to have shock and fear and which he found to be a horrifying experience which occurred when under direction he used a new machine and he unwrapped as he was obliged to do, cables with his hands firstly the layer with pitch on it, then paper then lead and again to the point where there was a layer of paper between himself and what turned out to be a live cable. This was the event and to an experienced network technician with the ESB who was skilled in his job and with twenty years' experience and a hard worker, this was the horrifying event where he apprehended and suffered sudden perception of real danger to himself, in direct exposure to same."

15. A similar finding is to be found at para. 76: -

> "The logic of the situation is that there was one incident which [involved] seconds which caused visual shock to the plaintiff where he was in fear of at least serious injury, if not death."

16. In exchanges with this court during the course of submissions, the plaintiff's counsel conceded that, insofar as the trial judge appears to have held that the plaintiff suffered a sudden severe shock while in the hole where the cable was located, such finding was unsupported by the evidence and properly conceded that it was incorrect. The trial judge went on to find that the defendant had breached its duty of care to the plaintiff and was accordingly liable in damages.

17. The defendant appeals against the judgment on the essential basis that, contrary to what the trial judge found, his injury was not occasioned by "nervous shock" as that term is understood and applied in the relevant jurisprudence. The defendant also contends that there was in fact no horrifying event that led to the plaintiff's psychiatric injury. Thus, the defendant submits that the question posed at the start of this judgment should be answered in the negative.

Liability for Psychiatric Injury

18. The common law, in this jurisdiction at any rate, has recognised for well over a century that damages may be recovered for psychiatric injury unaccompanied by physical injury. Recovery has been permitted in what are commonly described as "nervous shock" cases. Whilst the expression "nervous shock" has frequently been described as outmoded and antiquated in modern times, it provides a convenient label well understood by lawyers for describing a category of claim where such damages may be recovered. In the Victorian era, the common law, in England at any rate, was slow to accept the validity of such claims perhaps in keeping with the mores of the times. The Irish courts, interestingly, appear to have been more progressive in this area.

19. In an unreported decision which appears to date from 1884, *Byrne v. Great Southern and Western Railway Company* (February, 1884) CA, the plaintiff was the superintendent of the telegraph office at the Limerick Junction station. He occupied a small building at the end of a siding, protected by a buffer. As a result of the railway company's negligence, points were left open causing a train to crash through the buffer and the wall of the telegraph office while the plaintiff was inside. In his evidence he described getting a great fright and shock although "a hair of my head was not touched". He suffered

nervous shock as a result and recovered damages. The Irish Court of Appeal refused to overturn the verdict.

20. In 1888, some four years later, *Victorian Railway Commissioners v. Coultas* [1888] 4 TLR 286 was decided by the Privy Council in England. Due to the negligence of the employees of the railway company, gates at a level crossing were left open allowing the plaintiff to drive her carriage over the train tracks as a train was approaching placing her in imminent danger of death which she narrowly avoided, in an early example of a near miss scenario. The medical evidence showed that the plaintiff received a severe nervous shock from the fright and developed a subsequent illness as a consequence of that fright. The Privy Council on appeal dismissed her claim. In his judgment, Sir Richard Couch said: -

> "Her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances be considered a consequence which, in the ordinary course of things would flow from the negligence of the gatekeeper."

21. Each of these conflicting authorities was considered in the judgment of Palles CB in the Irish Court of Exchequer in *Bell v. Great Northern Railway Company* [1890] 24 ILTR 82. The plaintiff was a passenger on a train which had left Armagh but on reaching an incline, the engine was unable to pull all the carriages up the hill. The carriages were divided and the train continued with the plaintiff on it. However, the brakes on the remaining carriages failed and they ran, out of control, down the hill and collided with another train coming from Armagh resulting in great loss of life and injury.

22. When the loose carriages began running down the hill, the officials on the plaintiff's part of the train saw what happened and tried to follow it. The plaintiff's part of

the train also ran at great speed towards Armagh and pulled up sharply after a curve and within a short distance of the collision. There was a terrifying scene and some people jumped off the plaintiff's train. She was thrown down by the sudden stop but was not physically injured. In his judgment finding for the plaintiff, Palles CB referred to *Byrne* and *Coultas.* He declined to follow *Coultas* preferring instead the reasoning in *Byrne.* Although not expressly so stated in the report, it seems clear that the plaintiff sustained a nervous shock as a result of her apprehension that she was about to be killed or injured in a train crash, rather than by her perception of the aftermath of the earlier collision.

23. In each of these cases, the plaintiff was put in fear of immediate death or injury by a sudden calamitous event. Such an event was also the subject matter of the plaintiff's claim in *Dooley v. Cammell Laird and Mersey Insulation Co. Ltd* [1951] 1 Lloyd's Rep 271. The plaintiff was a crane driver employed by the defendant who was in the process of lowering a load into the hold of a ship where his fellow employees were working. Before the load could be lowered into the hold, the rope retaining the load broke causing it to fall into the hold. The plaintiff immediately apprehended that he had killed or injured his fellow workers and as he described it, "I felt wretched". In fact, nobody had been injured but the plaintiff was not to know this until later. He suffered nervous shock as a consequence of these events and was held by Donovan J. to be entitled to recover damages from the defendants.

24. These cases share the common thread that the plaintiff was a direct participant and centrally involved in the sudden horrifying event that led to the nervous shock. To that extent, these cases differ from many of the later authorities on nervous shock which are concerned with what might be described as "aftermath" cases and cases where the plaintiff perceives the relevant event but is not directly involved in it. This has led to considerable

debate in the courts in England and Wales concerning the classification of plaintiffs and whether they ought to be regarded as primary or secondary victims, a distinction yet to be embraced in this jurisdiction – see in that regard the helpful analysis by Keane J. in *Sheehan v Bus Eireann* [2020] IEHC 160.

25. The incremental development of the common law in this area is well described by McMahon and Binchy's Law of Torts (4th Ed.) at para. 17.02: -

> "At an early stage, [the courts] were prepared to compensate the psychiatric injuries when they accompanied physical injuries. The psychiatric injuries were accessorised to the physical injuries… The problem moved next to the situation where the plaintiff, although not suffering any physical injury, was put in the position where he reasonably feared physical injury to himself, but, fortunately, escaped; where, for example, the plaintiff sees a container falling towards him from a height, and fortunately jumps from under it before it hits the ground. Once more, perhaps because of the real fear of physical injuries to the plaintiff himself, the courts indicated a willingness to compensate the plaintiff for the fright he got. It was a small step, then, to recognise as deserving of compensation, the situation where the plaintiff's immediate fear of physical injury was not for himself, but was for his children nearby… Likewise, the courts extended for recovery for shock induced psychiatric consequences where the threat of the immediate physical injury was to a co-worker nearby [citing *Dooley*]".

26. In each of the above cases, a sudden horrifying event has occurred, sometimes causing injury and damage and sometimes not. A sudden event has occurred in each case, aptly described by counsel for the defendant in this appeal as a qualifying event. The

occurrence of the qualifying event causes the plaintiff to suffer a severe fright ultimately causing psychiatric injury.

27. In each case, the plaintiff apprehended, anticipated or expected that he or somebody else was in immediate and imminent danger of death or injury. The plaintiff's apprehension, anticipation or expectation is prospective towards an event just about to occur. In the cases just referenced, the plaintiff would be regarded by the classification developed in later authorities as a primary victim. The development of that classification and the distinction between primary and secondary victims has proved problematic.

28. In *McLoughlin v. O'Brian* [1983] 1 AC 410, the plaintiff's husband and three children were seriously injured in a road traffic accident. She was later brought to the hospital where she witnessed her family in great distress and suffered psychiatric injury as a result. The House of Lords found in her favour but for somewhat different reasons. Three of the Lords considered that a simple test of reasonable foreseeability should be applied. Two of the Lords, including Lord Wilberforce, felt that policy considerations, rather than foreseeability, should be determinative.

29. Lord Wilberforce applied a proximity test, both in terms of relationship and also time and space. It was necessary for the plaintiff to directly perceive the event by sight or sound. Merely being informed of the event was insufficient.

30. *McLoughlin v. O'Brian* was considered in this jurisdiction in *Mulally v. Bus Eireann* [1992] ILRM 722. The facts were similar. The plaintiff's husband and three of her young sons were seriously injured in a bus crash. Two of her sons were brought to one hospital and her husband and other son a different hospital. She visited both in turn where she witnessed appalling scenes involving her family which resulted in her suffering

psychiatric injury. Denham J. (as she then was) considered both *Byrne* and *Bell* observing (at p. 731): -

> "Thus the law is that a person who suffers nervous shock which results in psychiatric illness may succeed against the person who caused the nervous shock. The question then is whether the causation, nexus, exists between the defendant's negligence and the plaintiff's illness as the plaintiff was not at the scene of the accident."

31. She went to conclude that such a causal link was established on the basis that the shock to the plaintiff was foreseeable. She considered *McLoughlin v. O'Brian* and expressed a preference for the opinion of Lord Bridge, who was with the majority on the foreseeability issue as against that of Lord Wilberforce.

32. Shortly after *McLoughlin v. O'Brian,* the High Court of Australia decided *Jaensch v. Coffey* [1984] 54 ALR 417, a decision that later proved very influential in this jurisdiction. As in the two cases just cited, this involved the plaintiff's husband being seriously injured in a road traffic accident after which she attended hospital to find him in a very bad condition.

33. This ultimately led to her suffering psychiatric injury. In the course of a very erudite judgment, Brennan J. said (at pp. 428-9): -

> "The courts have insisted on proof of a demonstrable and readily appreciable cause of psychiatric illness - the cause itself being a result of the defendant's careless conduct - before damages for negligence occasioning psychiatric illness are awarded. A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably

foreseeable that psychiatric illness might be a consequence of the defendant's carelessness. The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child."

34. Thus, psychiatric injury is not compensable, even though reasonably foreseeable, unless it is accompanied by physical injury or alternatively is the result of "shock". In an important passage, Brennan J. elaborates on the notion of "shock" (at p. 430): -

"The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them. It is not surprising that Lord Macmillan noted in *Bourhill v. Young*, [1943] AC 92 at 103, that:

'… in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.'

I understand 'shock' in this context to mean the sudden sensory perception - that is, by seeing, hearing or touching - of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of a distressing phenomenon is essential. If mere knowledge of a distressing phenomenon

sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors." (my emphasis)

35. The distressing phenomenon is the qualifying event, the sudden sensory perception of which gives rise to liability. In a concurring judgment, Deane J. noted (at pp. 460-461): -

"The decided cases have been largely confined to circumstances where the psychiatric injury resulted from direct sensory observation of the scene of the apprehended or actual injury. The successful plaintiffs in cases involving those circumstances have included persons who have suffered psychiatric injury as a result of apprehended injury to themselves (see, e.g. *Bell v. Great Northern Railway Company*; *Dulieu v. White*) and persons who have suffered such injury as a result of apprehended or actual physical injury to a son or daughter (see e.g. *Hambrook v. Stokes Bros*; *Benson v. Lee*), to some other close relatives such as a brother (*Storm v. Geeves*), or to a stranger (*Chadwick v. British Railways Board* [1967] I WLR 912)."

36. *Jaensch v. Coffey* was among the authorities considered by the House of Lords in *Alcock v. Chief Constable of South Yorkshire* [1992] 1 AC 310. This was one of a series of cases that arose out of the Hillsborough Stadium disaster in which 95 people were crushed to death and many more suffered serious injuries. This was caused by overcrowding which had arisen as a result of the negligence of the defendant. The football match in the stadium was being broadcast on live television when the disaster unfolded. The plaintiffs were all relatives or friends of spectators involved in the disaster. Some of the plaintiffs witnessed the events from other positions in the stadium while others saw the television broadcast. Some of those observing the television broadcast were immediately outside the stadium while others were at home.

37. The House of Lords adopted the views of Lord Wilberforce in *McLoughlin v. O'Brian* that reasonable foreseeability alone was not sufficient to establish liability. The plaintiffs also had to satisfy a proximity test. That test applied not just to the relationship between the plaintiff and the victim but also to the means of communication. In one of the leading judgments, Lord Ackner approved the three elements of the test posited by Lord Wilberforce. These related to the class of persons whose claim should be recognised, the proximity of the plaintiff to the accident and the means by which the shock is caused. In his analysis of the nature of the cause of action, Lord Ackner identified five principles that emerged from the authorities (at pp. 400-401): -

> "It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage. Whatever may be the pattern of the future development of the law in relation to this cause of action, the following propositions illustrate that the application simpliciter of the reasonable foreseeability test is, today, far from being operative.
>
> (1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages… [he instances examples given by Brennan J in *Jaensch v. Coffey*]
>
> (2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In *Bourhill v Young* [1943] AC 92,103, Lord

Macmillan only recognised the action lying where the injury by shock was sustained 'through the medium of the eye or the ear without direct contact'. Certainly Brennan J, in his judgment in *Jaensch v. Coffey* 155 CLR 549, 567, recognised:

> 'A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential.' …

(3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages…

(4) As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable…

(5) 'Shock', in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system." (my emphasis)

38. Of course, *Alcock* was not an aftermath case in the sense that the plaintiffs all perceived the occurrence of the disaster as it happened. Some three years later, another aftermath case came before the Supreme Court.

39. In *Kelly v. Hennessy* [1995] 3 IR 253, the plaintiff's husband and daughters were the victims of a car accident in which they were seriously injured. The plaintiff was telephoned with the news and immediately went into shock. She was brought to the

hospital where she saw the members of her family in a distressing condition. She suffered psychiatric injury. Hamilton C.J., in a judgment with which Egan J. concurred, summarised the legal principles in a passage that has been frequently cited in many other cases (at p.5).

> "The cases seem to establish that in order to succeed in an action for damages for nervous shock a plaintiff must establish the following:
>
> 1. The plaintiff must establish that he or she actually suffered 'nervous shock'. This term has been used to describe 'any recognisable psychiatric illness' and a plaintiff must prove that he or she suffered a recognisable psychiatric illness if he or she is to recover damages for 'nervous shock'…
>
> 2. A plaintiff must establish that his or her recognisable psychiatric illness was 'shock-induced'… [The Chief Justice then referred to passages from the judgment of Brennan J. in *Jaensch v. Coffey* to which I have referred above].
>
> 3. A plaintiff must prove that the nervous shock was caused by a defendant's act or omission…
>
> 4. The nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.
>
> This view was clearly expressed by Deane J. in *Jaensch v. Coffey* as being the present state of the law when he said that a duty of care (and hence liability for nervous shock) will not exist unless 'the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness caused the injury'…

5. If a plaintiff wishes to recover damages for negligently inflicted nervous shock, he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

It is not enough to show that there was a reasonably foreseeable risk of personal injury generally. Deane J. stated in *Jaensch v. Coffey*, already cited (at p. 604) that:

> 'a duty of care will not arise unless risk of injury in that particular form (i.e. psychiatric injury unassociated with conventional physical injury) was reasonably foreseeable.' "

40. The Chief Justice referred with apparent approval to passages from the judgments in *McLoughlin v. O'Brian*, quoting from those of Lord Bridge and Lord Wilberforce but without expressing an apparent preference for the approach of either. He did, however, concede that public policy had a role to play to the extent that in his view, there was no public policy that the plaintiff's claim should be excluded. At the same time however, he referred with approval to a passage from the judgment of Lord Russell, who was with the majority whose view was that the case should be governed by considerations of reasonable foreseeability rather than issues of policy. In that passage, Lord Russell expressed scepticism towards the "floodgates" argument advanced by those opposed to a simple reasonable foreseeability test.

41. Denham J., in a concurring judgment on the liability issue, reviewed the law in relation to nervous shock. She noted that the defendant had submitted that *Mullally v. Bus Éireann* should be distinguished and that public policy required that the plaintiff be excluded. In something of a departure from her views in *Mullally,* Denham J. considered that the matter did not rest on foreseeability but rather on the issue of proximity, which

appears to more closely align with the views of Lord Wilberforce in *McLoughlin v. O'Brian*.

42. However, she also cited passages from the judgment of Lord Bridge suggesting that reasonable foreseeability, rather than policy, should be the guiding principle. Whilst on one reading these views might be seen as perhaps somewhat ambiguous, Denham J. felt it was not necessary in the particular case to choose between either the general or more restricted approach in common law, as she described it. In truth, the difference between those who advocate reasonable foreseeability rather than policy considerations as the guiding principle may be more apparent than real. As noted by McMahon and Binchy, the "factors" to be assessed in determining whether damage is reasonably foreseeable may in reality be thinly disguised policy considerations by another name. (Op. cit. at 17.25).

43. Much of the English jurisprudence is concerned with distinctions between primary and secondary victims and the respective duties owed to each. That is an issue that has not been definitely decided in this jurisdiction. The distinction was criticised by one of the authors of McMahon and Binchy speaking judicially rather than academically, His Honour Judge McMahon, then a Circuit Court Judge, in an important judgment in *Curran v. Cadbury Ireland Limited* [2000] 2 ILRM 343. Although the primary/secondary victim distinction is not relevant in the circumstances of this appeal, given that the sole putative victim was the plaintiff, the facts of that case provide a useful comparator.

44. The plaintiff was working at a conveyor belt carrying chocolate bars to her work station for packaging. The machine was turned off as there was a fitter inside the machine repairing it, unbeknownst to the plaintiff. She turned on the machine, immediately hearing the screams of the fitter inside whom she thought she had killed for seriously injured.

Although that turned out not to be the case, the plaintiff got a severe fright and developed a serious psychiatric illness. The judge graphically described the facts (at p. 4): -

> "From the facts of the case it is clear that the plaintiff in this case, unlike other nervous shock cases which have come before the Irish courts in recent years, was a participant in, and not a mere observer of the accident. She started the machine. She pressed the button. She heard the commotion and the screams since the fitter, although out of sight, was quite close to her. She unwittingly caused the injuries to the fitter. Thinking she had killed or seriously injured her fellow employee she quickly turned off the power and then ran some 45 yards around the machinery to see the result of her work. As she ran she was filled with apprehension and probably, irrational guilt. Her evidence was that when she arrived at the scene where the fitter was she was blinded with panic. She could not see the fitter's face. All she saw was a blur where his face was and she became aware of a person frantically trying to get out of his overalls: she had cause to fear the worst.
>
> There is little doubt that the plaintiff got a great fright and shock and that this resulted in the psychiatric condition attested to by the medical experts at the trial…
>
> These facts clearly show that the plaintiff was at the very centre of this frightening episode. She was in the eye of the storm. In the terminology that is gaining currency in other jurisdictions, she was 'a primary victim'. She was not a 'secondary victim', that is a person who was not involved in the accident itself, but was removed from the direct action or came on the immediate aftermath of the accident. The plaintiff had a central role in this frightening drama."

45. With what was described in a subsequent Supreme Court judgment (infra) as his "customary erudition", Judge McMahon set out the law concerning primary and secondary

victims and what he described as "The basic principles". In a passage entitled "Kind of Harm: Psychiatric Illness", the judge identified issues relevant to the present appeal (at p. 7): -

> "Second, such harm [psychiatric illness] is recognised as compensable in negligence only if it is brought about by a shock or sudden event. Compensation in this jurisdiction is not available for general grief or sorrow (*Hosford -v- John Murphy and Sons Ltd* [1988] I.L.R.M. 300) or for a condition which is brought about over a period of time, for example, the wear and tear which caring parents might suffer if they have to look after a son or daughter severely injured in an accident (*Kelly -v- Hennessy*, supra). Again, there was agreement in this case that the plaintiff's condition was brought about by the crisis which followed when she switched on the machine…"

46. The judge went on to discuss "reasonably foreseeable psychiatric illness" saying in that context (at pp. 7-8): -

> "In the present case it is clear from the evidence and from the facts already outlined that it was reasonably foreseeable, if the plaintiff switched on the machine while the fitter was inside the housing, that the fitter would in all probability be physically injured and that the plaintiff would get a great fright which could easily result in a serious assault on her nervous system and result in psychiatric illness. It must surely be conceded that when the machine was switched on with the fitter inside 'all hell would break loose', to use the Plaintiff's own phrase in evidence. The noise, the screams, the malfunctioning of the machine, the shout of alarm from others, all assaulting the plaintiff through her own senses, would frighten the most courageous. Add to this the guilt factor, irrationally assumed by the plaintiff as a result of her

causative role, and one has a combination that would frighten the bravest soul. The psychiatric illness (PTSD) that these events triggered was acknowledged by the doctors who gave evidence.

It is clear therefore, that the defendant owed the plaintiff a duty of care in the circumstances; that there was a breach of its common law duty to take care; that the defendant attracted liability vicariously through the negligence of its employees; and, finally, that the plaintiff suffered a compensatable injury which was reasonably foreseeable in the circumstances."

47. Judge McMahon was further of the view that there were no relevant policy considerations which would militate against the imposition of liability in the case. He was satisfied that the plaintiff complied with all five conditions laid down by Hamilton C.J. in *Kelly v. Hennessy* and was entitled to succeed. Those conditions were also held to have been satisfied in *A v. C* [2007] IEHC 120 where Laffoy J. awarded damages to the plaintiff who suffered nervous shock in circumstances where her infant was in imminent danger as a result of the sudden demolition of a boundary wall at 6 a.m. by the adjoining landowner further to a family dispute.

48. Nervous shock arose again for consideration by the Supreme Court in a somewhat different context in *Fletcher v. Commissioners of Public Works* [2003] 1 IR 465. The plaintiff was exposed to asbestos dust in the course of his work for the defendants at Leinster House as a result of their negligence. He had no physical manifestation of the exposure and was advised by his medical consultant that his risk of contracting mesothelioma was remote. Nonetheless, he developed an irrational fear of contracting the disease which led to psychiatric injury. He advanced his claim before the Supreme Court on two bases. The first was that he was entitled to succeed on the basis of the nervous

shock jurisprudence and the second, that the injury was the foreseeable consequence of his employer's negligence.

49. The five-member Supreme Court delivered two judgments by Keane C.J. and Geoghegan J., with whom each of the other members agreed. The Chief Justice reviewed the legal principles by reference to each of the cases to which I have already referred. He noted the developing jurisprudence in England and Wales on the question of primary and secondary victims noting that the plaintiff here was clearly not a secondary victim but rather the only victim. The distinction did not thus arise for consideration on the facts of the case.

50. He also dealt with the somewhat controversial issue, in England at any rate, of the foreseeability of psychiatric injuries. He noted that at one time, the English courts had accepted that for liability for psychiatric illness to arise, it must have been reasonably foreseeable. Foreseeability of physical injury was not enough. The House of Lords, however, departed from that approach in *Page v. Smith* [1996] AC 155. The plaintiff was involved in a road traffic accident in which he suffered no physical injury but subsequently developed a psychiatric illness. The defendant argued that this illness was not reasonably foreseeable but the Lords held that once it was reasonably foreseeable that some injury would occur as a result of the defendant's negligence, it was immaterial whether the actual injury sustained, being psychiatric, was foreseeable. Emphasis was placed on the fact that the plaintiff was a primary victim but the position would be different for secondary victims where the foreseeability of psychiatric injury would remain an essential ingredient to liability.

51. This decision was later severely criticised in a subsequent decision of the House of Lords, *White v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455 by Lord Goff

of Chieveley. Keane C.J. also drew attention to the fact that the majority decision in *Page v. Smith* was also criticised by academic commentators as being in conflict with a significant body of prior law in the U.K. and Australia.

52. The Chief Justice accepted that if the medical advice to the plaintiff was that he would contract the disease as a matter of probability causing him to suffer psychiatric disorder, liability would arise. He recognised that it was questionable whether the law should apply the "eggshell skull" rule in cases of psychiatric illness, although the test that the defendant must take the plaintiff as he finds him is routinely applied in personal injury litigation in general. He went on to say (at p. 480): -

> "…In a case such as the present the question of liability must be resolved, not by the exclusion of the eggshell skull principle, but by determining whether the absence of physical injury is fatal to the plaintiffs claim. That in turn, depends on whether it falls within the category of 'nervous shock' cases and, if not, whether liability can still arise in what may be generically called 'fear of disease' cases."

53. In posing the question "Is this a 'nervous shock' case?", Keane C.J. observed that (at 480): -

> "The central issue in this case, accordingly, is not whether the defendants ought to have foreseen that the plaintiff would suffer psychiatric injury. It is whether the claim by the plaintiff comes within the category of 'nervous shock' cases in which the courts have awarded damages for such psychiatric injury, even in the absence of any physical injury, and, if not, whether the plaintiff was nonetheless entitled to recover damages in respect of the reasonably foreseeable psychiatric illness which was the consequence of his having been exposed to the risk of contracting mesothelioma. That further inquiry is necessary because of the care with which the

courts have approached claims for psychiatric illness, unaccompanied by physical injury, arising out of alleged negligence. The reasons for that cautious approach are considered at a later point in this judgment."

54. He went on to note that for a claim in nervous shock to succeed, the conditions laid down by Hamilton C.J. in *Kelly v. Hennessy* required to be met. He cited with apparent approval the dicta of Lord Ackner in *Alcock* defining the meaning of "shock" in this context, to which I have already referred. Keane C.J. then observed (at p. 481): -

"The plaintiffs in *Kelly -v- Hennessy* [1995] 3 IR 253 and *McLoughlin -v- O'Brian* [1983] 1 AC 410 each sustained 'nervous shock' in the sense indicated by Lord Ackner and were held entitled to recover because the resultant psychiatric illness was the foreseeable consequence of the wrongdoing which brought about the shock. In the present case, there was no shock of that nature; no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognisable psychiatric illness supervened. If the plaintiff is entitled to recover damages, it must be because such damages can be recovered in respect of a psychiatric disorder brought about otherwise than by 'nervous shock'…"

55. It follows from this conclusion that the case was, in his view, not one of 'nervous shock'. The judge noted that this was unchartered territory for our courts. He went on to say (at p. 482): -

"This, as Geoghegan J. points out in his judgment, is uncharted territory for our courts. It has been argued in this case that there is no reason in principle why the law should differentiate between a psychiatric illness which is induced by nervous shock and one such as the plaintiff in the present case has suffered, where both are the foreseeable result of the wrongdoing of the defendants. That issue must be resolved

by determining whether or not the extension of the law to permit the recovery of damages in cases such as the present should be excluded on policy grounds."

56. The Chief Justice expressed the view that where new categories of negligence arose, policy may have a part to play in determining the boundaries of legal liability. He sets out some of those policy arguments such as the "floodgates" argument, but says that there were even more powerful arguments against the imposition of liability. These included the undesirability of awarding damages for psychiatric conditions due to unfounded or hysterical fears. He referred to American authority in that regard. He concluded that in cases where there is no more than a very remote risk of contracting disease, recovery should not be allowed for psychiatric illness. He concluded (at p. 486): -

"I am, accordingly, satisfied that the law in this jurisdiction should not be extended by the courts so as to allow the recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of their negligent exposure to health risks by their employers, where the risk is characterised by their medical advisors as very remote."

57. In his concurring judgment, Geoghegan J., in referring to *Kelly v. Hennessy*, and the primary/secondary victim distinction said (at p. 492): -

"Without necessarily endorsing the terminology 'primary victim' and 'secondary victim' which has received judicial and academic criticism, it is not entirely clear whether the judgment of Hamilton C.J. applies only to a so-called secondary victim or whether it applies to a claim for damages for psychiatric injury only, brought by any victim, whether primary or secondary."

58. Geoghegan J. was of the view that *Kelly v. Hennessy* applied only to cases where an accident had occurred, in other words, a qualifying event. He said (at p. 494): -

> "I take the view that *Kelly v. Hennessy* [1995] 3 IR 253 does not govern these appeals. Whether one adopts the wider or narrower interpretation of *Kelly v. Hennessy* to which I have already referred, the decision should only be taken to relate to accident damage."

59. In that context, like Keane C.J., Geoghegan J. was of the view that the case fell into "virgin territory". This in turn required a consideration of the necessity for control mechanisms. He reviewed some of the cases already discussed noting (at p. 495): -

> "What does emerge from the English and Australian authorities and, indeed, American cases, is that there are control mechanisms which the courts apply to actions for damages for psychiatric conditions…"

60. He referred to five particular cases which he felt to be relevant to the general principles to be applied even though they were not "fear of disease" cases. The first was *McLoughlin v. O'Brian*. He cited the dicta of Lord Wilberforce noting that he made it quite clear that in psychiatric claims, control mechanisms were necessary in determining the limits of a duty of care and the limits of the type of damage recoverable. He notes that the judgments in *McLoughlin* accepted that foreseeability on its own does not automatically lead to a duty of care. He derived the same principle from *Jaensch v. Coffey* and cited with approval the dicta of Brennan J., already quoted above, to the effect that a plaintiff may recover only if the psychiatric illness is either the result of physical injury or is induced by "shock". He also quotes in full the five principles of Lord Ackner to which I have already referred "whether one accepts them in full or not". Of importance, he says, in

the context of the fifth principle defining the meaning of "shock" in relation to "nervous shock" (at p. 505): -

> "I find the last of those principles particularly instructive. There is no doubt that in a 'fear of disease' case, particularly when the disease is most unlikely to occur, psychiatric illness caused in such circumstances cannot be said to have arisen suddenly."

61. Geoghegan J. analysed the judgments in *Page v. Smith* and the five propositions identified by Lord Lloyd which, as previously noted, were subsequently criticised. Having referred to these, Geoghegan J. said (at p. 508): -

> "It is understandable that counsel for the plaintiffs should seek to find comfort in these statements of principle. But in my view they have little relevance to the issues involved in these appeals. First of all, these actions are not claims for damages for 'nervous shock' as that expression has been understood in the English case law as directly flowing from an accident or trauma. The second of those principles acknowledges that, in the case of certain types of victims, control mechanisms are necessary so as to limit the number of potential claimants. The House of Lords therefore, has rather arbitrarily held that, in the case of secondary victims, but not in the case of primary victims, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. That is also the law here in relation to secondary victims and it may well be the law in relation to primary victims, having regard to the decision of this court in *Kelly v. Hennessy* [1995] 3 IR 253.
>
> Under the fifth principle the shock must result in some recognised psychiatric illness but the severity or unusualness of the psychiatric illness is irrelevant. That would also be the case here if there was a duty of care and there was foreseeability of

psychiatric injury. It is the principle relating to damages usually known as 'the thin skull' principle.

But there is no logical reason, why, assuming that control mechanisms are necessary, there should be any similarity between the control mechanisms operative in the case of 'aftermath' or 'rescuer' cases on the one hand and 'fear of disease' cases on the other. In the absence of firm precedent, this court must consider whether control mechanisms are necessary in 'fear of disease' cases and, if so, what those mechanisms should be." (my emphasis)

62. Geoghegan J. went on to analyse a number of further authorities before reaching the final conclusion that it would be unreasonable to impose a duty of care on employers to guard against mere fear of a disease even if such fear might lead to a psychiatric condition.

63. In *Fletcher*, the Supreme Court concluded that the claim could not succeed for two reasons. The first was that it was not a nervous shock case at all as there was no qualifying event of the kind necessary to sustain such a claim. The second was that, for policy reasons, the law should not be extended to allow recovery to a plaintiff who suffered no physical injury but developed an irrational fear of contracting a disease.

64. Such policy reasons were again found to be an important factor by the Supreme Court in *Devlin v. National Maternity Hospital* [2008] 1 ILRM 401, [2008] 2 IR 222. The plaintiffs were the parents of a stillborn baby delivered at the defendant hospital. A post mortem was carried out without the plaintiffs' consent although they became aware of it shortly afterwards. However, they did not know that certain of the baby's organs were removed and retained by the defendant, a fact of which they only became aware some twelve years later as a result of correspondence from the hospital.

65. The first named plaintiff mother developed a psychiatric illness as a result of these events. The Supreme Court held that she was not entitled to recover. The sole judgment was delivered by Denham J. with whom the other members of the court agreed. She reviewed the Irish cases on nervous shock to which I have referred noting that the central issue was whether the plaintiff came within the category of nervous shock cases in which the courts have awarded damages for psychiatric injury, even in the absence of physical injury, or if not, whether the plaintiff was nonetheless entitled to recover. In a passage entitled "Event", Denham J. said (at p. 11): -

> "The common law has evolved by reference to the occurrence of a specific event - a railway or car accident. In *Alcock & Ors v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 at 401, Lord Ackner said: -
>
> > ' 'Shock', in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.'
>
> This statement reflects the common law in Ireland where the 'aftermath' cases either relate to the event, or the situation in its immediate aftermath."

66. She held that the plaintiff was not entitled to succeed because the fourth criterion stipulated by Hamilton CJ in *Kelly v. Hennessy*, that there must be actual or apprehended injury to the plaintiff or another person, was not fulfilled. As in *Fletcher*, she considered that policy had an important role to play in the court's approach and under the heading "Policy" said (at p. 12): -

“However, counsel for the plaintiff pressed the court, if it found that the current law did not apply, to extend it on general principles of the law of negligence.

This is a matter of significant general importance. Such a decision could have serious repercussions. In considering the extension of the common law liability for 'nervous shock', policy issues arise.

In *Fletcher* the issue as to whether the law should be extended also arose for consideration. This court refused to do so. Keane C.J. said that the law in this jurisdiction should not be extended by the courts so as to allow the recovery by those plaintiffs of damages for psychiatric injury resulting from a fear of contracting a disease because of their negligent exposure to health risks by their employers, where the risk was characterised by their medical advisers as very remote.

Thus there are limits in law to liability for nervous shock. The common law provides illustrations of successful cases where damages for nervous shock were awarded. However, those cases relate to persons perceiving an accident or its immediate aftermath.

This is a tragic case. In essence it arises because of the receipt of bad and sad news in a letter from the hospital. It is a hard case. The parents are entitled to deepest sympathy for their loss. However, the law as it stands does not entitle them to damages and I would not extend the law. Any such development would give rise to uncertainty in the law of liability generally and to potentially unforeseeable repercussions. Consequently, I would dismiss this aspect of the appeal also.”

Discussion

67. The requirement for the occurrence of a "sudden" event, be it described as shocking, distressing, horrifying, terrifying or calamitous, has consistently been held in this jurisdiction to be a prerequisite to recovery for purely psychiatric injury. Such an event was described by Geoghegan J. in *Fletcher* and Denham J. in *Devlin* as an "accident". Lord Ackner's definition of "shock" has been consistently approved in Ireland. Thus, what he describes as more gradual assaults on the nervous system over a period of time do not qualify. That the injury must be "shock induced" is clear from Hamilton C.J.'s second principle in *Kelly v. Hennessy,* adopted from the dicta of Brennan J. in *Jaensch v. Coffey.* Brennan J. adopted a very similar definition of "shock" to that of Lord Ackner.

68. The High Court of Australia subsequently moved away somewhat from the approach of Brennan J. in *Tame v. New South Wales; Annets v. Australian Stations Pty. Limited* [2002] HCA 35, 211 CLR 317, a case relied upon here by the plaintiff. The plaintiff's son, aged 16, went to work for the defendant as a jackaroo in August 1986. Seven weeks later, contrary to assurances given the plaintiff by the defendant, he was sent to work alone as a caretaker of a remote property.

69. In December 1986 he went missing in circumstances where it was clear that he was in grave danger. His father was informed of this over the telephone and collapsed. There followed a prolonged search for the child. In January 1987 his blood stained hat was found. Finally, in April 1987 his body was found in the desert. Against this background, Gleeson C.J. stated (at para. 35 and 36): -

> "Upon those facts, which left unclear a number of questions as to the aetiology of the psychiatric injuries sustained by the applicants, the Full Court concluded that

there was no satisfaction of the requirements of sudden shock or direct perception, even as relaxed in *Jaensch v. Coffey*…

The process by which the applicants became aware of their son's disappearance, and then his death, was agonisingly protracted, rather than sudden. And the death by exhaustion and starvation of someone lost in the desert is not an 'event' or 'phenomenon' likely to have many witnesses. But a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injury suffered by parents who see their son being run down by a motor car, is indefensible."

70. Gaudron J. expressed similar sentiments (at para. 66): -

" 'Sudden shock' may be a convenient description of the impact of distressing events which, or the aftermath of which, are directly perceived or experienced. And it may be that, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. However, no aspect of the law of negligence renders 'sudden shock' critical either to the existence of a duty of care or to the foreseeability of a risk of psychiatric injury. So much should now be acknowledged."

71. In their joint judgment, Gummow and Kirby JJ endorsed that view. They quoted Brennan J.'s definition of "shock" and observed (at para. 206): -

"No other member of the Court in *Jaensch v Coffey* expressly adopted the requirement of 'sudden shock'. The remarks of Deane J. (with whom Gibbs C.J. agreed generally) are inconclusive and neither Murphy J. nor Dawson J. directly considered the issue. Subsequent authority in the House of Lords has identified

> 'sudden shock' as a distinct and necessary element of liability [citing *Alcock*]. So too trial and intermediate appellate courts in Australia have treated the remarks of Brennan J. as authoritative. However, in the absence of acceptance by a majority of this Court of the need to establish 'sudden shock', it is not a settled requirement of the common law of Australia."

72. It is readily understandable why the plaintiff urges on this court that this authority should be followed, in the event that this court were to conclude, contrary to the plaintiff's primary argument, that there was no sudden shock or qualifying event in the instant case. However, it is clear to my mind that these observations by the High Court of Australia do not represent the law in this jurisdiction in the light of the requirement repeatedly stated by our Supreme Court of the necessity for an event that is sudden and shocking.

73. The same observations apply to a lesser extent to another English authority relied on by the plaintiff, *Donachie v. The Chief Constable of the Greater Manchester Police* [2004] EWCA Civ 405. The plaintiff was a policeman who was required in the course of his duty to attach a tracking device to the underside of a car belonging to a criminal gang. The car was parked outside a public house where the criminals were drinking. When the plaintiff attached the device, it was found not to be sending out a signal so he had to retrieve it and ultimately it transpired that the battery was not working.

74. However, before this discovery was made, the plaintiff had to repeat the exercise no less than nine times and, on each occasion, subject to the increasing danger and fear that he would be detected by the criminals and severely injured or even killed. The plaintiff suffered from high blood pressure and the stress of these events led to him developing psychiatric illness and ultimately a stroke. The Court of Appeal held that he was entitled to succeed. Auld L.J. was of this view (at para. 24): -

> "I should add that, even if it had been necessary to look for an 'event' in this case sufficient to enable Mr Donachie to rely as a primary victim on reasonable foreseeability of psychiatric, as distinct from physical injury, I would have had sympathy with Mr Turner's submission that the circumstances in which he had been placed as a police officer, coupled with his fear engendered by those circumstances of physical injury, are indistinguishable in principle from occurrence of such injury. If A puts B in a position which A can reasonably foresee that B would fear physical injury, and B, as a result, suffers psychiatric injury and/or physical injury, B is, in my view, a primary victim. If it were necessary to characterise the onset of the fear causative of such injury as 'an event', I would do so. There is all the difference in the world between a person like Mr Donachie, put in such a position by the tortfeasor, and someone who happens to learn from afar and/or a significant time afterwards of an event in which he had no involvement, the discovery of which he claims to have caused him psychiatric injury."

75. Even accepting for a moment that the facts in *Donachie* could be regarded as complying with the requirements of *Kelly v. Hennessy*, which must be open to serious doubt, I do not think this case is of assistance to the plaintiff. The cause of the injury in *Donachie* was the plaintiff knowingly being placed in extreme danger and fearing for his life. Those features are of course entirely absent here. The plaintiff here did not knowingly enter into a dangerous situation where he knew that at any moment, he might be killed or injured. It was that knowledge in *Donachie* that caused the injury.

76. Indeed, it does not seem to me that the plaintiff here established that he was ever, in fact, in danger. Although there was some argument about whether the MV cable was insulated or not, it is in my view clear from the evidence as a whole that at all material

times, the cable remained insulated. Were it otherwise, the plaintiff would have been electrocuted when he touched it but he handled it several times without incident. It must follow that the insulation was present and effective.

77. It is therefore unclear to me what the trial judge had in mind in referring to "the shock of his exposure to the 10,000 kilovolt cable" in several passages of her judgment. At para. 60 she refers to the fact that the plaintiff was directly exposed to live electric cables. Insofar as this is intended to convey that the plaintiff was at risk of electrocution, it cannot be correct. That risk never arose and would only have been realised if the plaintiff continued on the course he had originally intended before realising that to do so would have been extremely dangerous.

Conclusion

78. In my judgment, the plaintiff cannot satisfy the requirements of the second and fourth principles identified by Hamilton C.J. in *Kelly v. Hennessy*. The injury was not "shock induced", as the second principle requires, in the sense that this expression is explained in the authorities to which I have referred. There was no sudden calamitous or horrifying event in the nature of an accident. There was thus no qualifying event and on one view, no event at all. There was instead a post hoc realisation that injury had been avoided by a decision not to proceed with what, with hindsight, was a dangerous course. The implications of that realisation unfolded over a period of hours for the plaintiff.

79. Hamilton C.J.'s fourth principle requires that the plaintiff must sustain the nervous shock by reason of actual or apprehended physical injury to the plaintiff or some other person. There was much debate during this appeal so as to the meaning of "apprehended" but in my view, its meaning in this context is clear. The apprehension must be prospective or forward looking to something yet to happen.

80. Thus, in the nervous shock cases where there was no actual injury to a third party, as in the railway disaster cases, each plaintiff believed that he was about to be killed or injured, something which fortuitously did not come to pass. Similarly, the crane driver who dropped the load in *Dooley* and the factory operative who switched on the machine in *Curran*, both believed in the moment that another person was about to be killed or injured.

81. Apart from this, the imposition of liability in a case such as the present gives rise to obvious practical difficulties. Perhaps the most obvious is, at what point in the process being engaged in by the plaintiff might the liability be said to have arisen? The plaintiff intended to apply the metal probes to the MV cable. He was not in a position to do so when he understood the danger. The probes were in the van and he would have had to get out of the hole, go to the van, fetch the probes, return to the hole and apply them to the cable. At what point in that process, or even earlier, might liability be said to arise as a result of the plaintiff's appreciation of the danger?

82. One can think of an infinite number of scenarios where the continuation on a particular course could lead to danger but the danger is avoided, fortuitously or otherwise, because it is appreciated in time. A person walks to an unguarded cliff edge in darkness without realising it is there. He switches on a flashlight and sees the danger, realising with one further step, he might have been killed. Ignoring for the moment that no qualifying event has occurred, at what point in his journey might the liability arise? Was it one step, ten steps or a hundred steps from the edge?

83. Were liability to be imposed in this case, it would inevitably involve an extension of the existing law in this jurisdiction. Policy considerations of the kind discussed in *Fletcher* and *Devlin* would become relevant. A case such as the present, dependant on a purely internal realisation by the plaintiff, unaccompanied in many instances by any verifiable

event or incident, would give rise to considerable practical problems and real uncertainty in the law.

84. This case, in my view, is governed by *Kelly v. Hennessy* which, like *Fletcher* and *Devlin*, is binding on this court. There is therefore no basis for a consideration by this court of any extension of the law. That would ultimately be a matter for the Supreme Court in a future case where it arises. While I have considerable sympathy for the plaintiff who undeniably suffered psychiatric injury, I am satisfied that the answer to the question posed in paragraph 1 above must be "No".

85. For the reasons given therefore, I would allow this appeal, set aside the order of the High Court and dismiss the plaintiff's claim.

86. With regard to costs, since the defendant has been entirely successful, my provisional view is that it is entitled to the costs of the appeal and the hearing in the High Court. If the plaintiff wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal office within fourteen days for a brief supplemental hearing on the issue of costs. In default of such application, an order in the terms proposed will be made.

87. As this judgment is delivered electronically, Donnelly and Binchy JJ have indicated their agreement with it.