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Leverick, F. (2007) *Counting the ways of becoming a primary victim: Anderson v Christian Salvesen*. Edinburgh Law Review, 11 (2). pp. 258-264. ISSN 1364-9809

<http://eprints.gla.ac.uk/37948/>

Deposited on: 02 April 2012

EdinLR Vol 11 pp 258-264

Counting the Ways of Becoming a Primary Victim: *Anderson v Christian Salvesen Plc*

A. INTRODUCTION

The law on recovery in negligence for psychiatric injury where the pursuer has not suffered any physical injury but has witnessed the death or injury of another has been described as “confusing and arbitrary”,¹ a “panoply of artificial rules”,² “irrational and unsympathetic”,³ and “the area where the silliest rules now exist and where criticism is almost universal”.⁴ In fact, it is difficult to think of another branch of delict that has been subject to such extensive condemnation.

It is into this arena that the recent Outer House case of *Anderson v Christian Salvesen*⁵ enters. In *Anderson*, the pursuer claimed to have suffered psychiatric injury after involuntarily causing the death of a fellow employee. He suffered no physical injury, nor was he in any danger of doing so. In order to understand the significance of the case, a brief examination of the history of liability for this type of psychiatric injury is necessary.

B. BACKGROUND

The starting point for the modern law is *Alcock v Chief Constable of South Yorkshire*.⁶ The case was the first of two House of Lords decisions that stemmed from events at the Hillsborough disaster. *Alcock* involved claims against the police, who allowed football supporters to enter an already over-crowded caged area, by relatives and friends who witnessed or heard about the deaths of their loved ones. None of the claims was successful. In the course of his judgment, Lord Oliver made a distinction between primary and secondary victims of psychiatric injury, the first time this had been done explicitly in the case law. Primary victims were those who suffered psychiatric injury after being directly involved (although not actually injured) in the incident in question. The exact definition of a primary victim is the central issue in *Anderson* and is considered shortly. At this point it is sufficient to note that the claims of primary victims are not subject to any special restrictions and, as long as the psychiatric illness in question is a “recognised psychiatric illness”,⁷ they merely have to satisfy the normal rules of reasonable foreseeability of injury in order to recover.

Secondary victims, on the other hand – those who suffer psychiatric injury after

1 M J M Bogie, “The shocking future: liability for negligently inflicted psychiatric illness in Scotland” 1997 JR 39 at 52.

2 F McManus and E Russell, *Delict: A Comprehensive Guide to the Law* (1998) 81.

3 T Weir, *An Introduction to Tort Law*, 2nd edn (2006) 50.

4 J Stapleton, “In restraint of tort”, in P B H Birks (ed), *The Frontiers of Liability*, vol 2 (1994) 83 at 95.

5 [2006] CSOH 101, 2006 SLT 815.

6 [1992] 1 AC 310.

7 As opposed to mere grief or mental suffering: see e.g. *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 at 491 per Lord Steyn.

witnessing the death or injury of others – have to satisfy a number of additional control mechanisms which were first set out in the earlier House of Lords case of *McLoughlin v O'Brian*,⁸ but which were developed in *Alcock* and have come to be known as the *Alcock* requirements. Essentially the pursuer must have had a close tie of love and affection with the dead or injured person⁹ and he or she must also have been present at the accident or its immediate aftermath.¹⁰ Because of the restrictive nature of these requirements, it is clearly advantageous to a pursuer to avoid being classified as a secondary victim and therefore the precise distinction between primary and secondary victims is of considerable importance. In *Alcock*, Lord Oliver defined a primary victim variously as someone who was “directly involved in the accident”, “involved, either mediately or immediately, as a participant”, and “personally involved in the incident out of which the action arises”.¹¹ He contrasted this to a secondary victim, who “was no more than the passive and unwilling witness of injury caused to others”.¹² Lord Oliver proceeded to give three examples of plaintiffs he would consider to be primary victims: those who feared for their own safety,¹³ rescuers¹⁴ and those who were an “involuntary cause” of the death or injury of another.¹⁵

Page v Smith,¹⁶ the next case to come before the House of Lords, took a rather different approach. Here, Lord Lloyd defined a primary victim as one who is “directly involved in the accident, and well within the range of foreseeable physical injury”, contrasting this to a secondary victim who is “in the position of a spectator or bystander”.¹⁷ This is a significant restriction of Lord Oliver’s definition in *Alcock*. It is relatively easy to envisage cases where a pursuer is “directly involved in the accident” (which would, presumably, satisfy Lord Oliver’s requirements) but is not in any physical danger and does not perceive himself to be in any physical danger.

It was this more restrictive definition that was approved in the most recent House of Lords authority, *White v Chief Constable of South Yorkshire*.¹⁸ This case involved the claims of police officers who were on duty at Hillsborough and who assisted with the rescue effort. The plaintiffs were clearly going to face difficulties in recovering through the secondary victim route, given that they had no close ties of love and affection with those who were killed. It was vital to the success of their case, therefore, to bring themselves within the definition of a primary victim. They attempted to do so in two ways: by virtue of being rescuers and by virtue of their employment relationship

8 [1983] 1 AC 410.

9 There is a rebuttable presumption that close ties exist between parents/children and spouses (see *McLoughlin* at 422 per Lord Wilberforce; *Alcock* at 403 per Lord Ackner). Others have to prove that a close tie exists.

10 *McLoughlin* at 422 per Lord Wilberforce; *Alcock* at 404 per Lord Ackner.

11 At 407-408.

12 At 407.

13 At 407.

14 At 408. The possibility of rescuers being placed in the class of primary victims solely by virtue of assisting at the scene of a disaster was subsequently ruled out in *White* at 455.

15 At 408. This category is discussed in more detail later in the context of *Anderson*.

16 [1996] AC 155.

17 At 184, emphasis added.

18 [1999] 2 AC 455.

with the defendant. Both routes failed.¹⁹ In rejecting their claim, Lord Steyn clearly regarded *Page v Smith* as having narrowed the definition of a primary victim:²⁰

Lord Lloyd [in *Page v Smith*] said that a plaintiff who had been within the range of foreseeable injury was a primary victim ... In my view it follows that all other victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the control mechanisms laid down in the *Alcock* case.

Of the other speeches in *White*, Lord Griffiths wrote on similar lines to Lord Steyn (although he dissented on the question of rescuers), distinguishing between “primary victims, that is victims who are imperilled or reasonably believe themselves to be imperilled by the defendant’s negligence”, and “secondary victims ... that is those who are bystanders”.²¹ Lord Hoffmann mentioned the distinction between primary and secondary victims only in passing and Lord Browne-Wilkinson agreed with the reasoning of both Lord Steyn and Lord Hoffmann. Only Lord Goff of Chieveley (who dissented both on the issue of rescuers and on the issue of the employment relationship) did not regard Lord Lloyd’s definition of primary victims in *Page v Smith* as authoritative, stating that the passage in Lord Lloyd’s speech “should be read as merely descriptive of the position of the plaintiff in *Page v Smith*” and not as having the effect that “primary victims can only recover if they are within the area of foreseeable physical danger”.²²

C. THE SCOTTISH CASES

Since *White*, a number of Outer House decisions in Scotland have addressed the issue of how a primary victim should be defined. Two of these – *Campbell v North Lanarkshire Council*²³ and *Keen v Tayside Contracts*²⁴ – adopted the *White/Page v Smith* definition of someone who was within the range of foreseeable physical injury or reasonably believed himself to be so.²⁵

This might well have been the end of the story if it had not been for *Salter v UB Frozen and Chilled Foods Ltd*.²⁶ Here, the pursuer suffered psychiatric injury after he was involved in an incident – for which he was not to blame – that killed a fellow employee. Gordon Reid QC, sitting as a temporary judge, concluded that the pursuer was a primary victim, despite the fact that he was not within the range of foreseeable physical injury and did not fear for his own safety. Instead of adopting the *White* definition, which would have resulted in the pursuer’s claim being ruled out, Temporary Judge Reid relied upon the definition of a primary victim from Lord Oliver’s

19 For a more detailed account of the reasoning in *White*, see S Todd, “Psychiatric injury and rescuers” (1999) 115 LQR 345; O Segal and J M Williams, “Psychiatric injury, policy and the House of Lords” [1999] *Journal of Personal Injury Litigation* 102.

20 *White* at 496-497.

21 At 464.

22 At 480.

23 2000 SCLR 373.

24 2003 SLT 500.

25 *Campbell* at 384 per Lord Reed and *Keen* at para 57 per Lady Paton.

26 2004 SC 233.

speech in *Alcock*, stating that:²⁷

In my opinion, on the assumed facts, the pursuer is a primary victim because he was *actively involved in the accident* which led to the death of his fellow employee.

The decision in *Salter* caused one commentator to suggest that “textbooks may have to be rewritten”²⁸ and meant that, at the time when *Anderson* came to be decided, there was some uncertainty in Scots law about the approach the courts should be taking to the primary/secondary victim distinction.

D. THE PRESENT CASE: ANDERSON v CHRISTIAN SALVESEN PLC

In *Anderson v Christian Salvesen plc*,²⁹ the pursuer, a lorry driver, claimed damages from his employer after the truck he was driving was involved in an incident in which one of his colleagues died. He was in no danger himself from the incident, nor was it his fault, but he claimed to have suffered psychiatric injury as a result. He was always going to struggle to recover if he was classified as a secondary victim as it is unlikely that he would have met the “close ties of love and affection” requirement – and it appears from the report of the case that he did not attempt to claim a close tie of love and affection with the deceased.³⁰ Thus the key issue in the case was whether the pursuer could be classified as a primary victim.

Lord Drummond Young was of the opinion that he could and allowed the case to go to proof. The basis upon which he did so is worthy of some comment. The first point to note is that Lord Drummond Young uses the relatively restrictive definition of a primary victim from *White* in preference to Lord Oliver’s more expansive definition in *Alcock*. Lord Drummond Young states that:³¹

In such cases, the test that has been adopted is ... that psychiatric injury will form a head of recoverable loss provided that the pursuer has been placed in danger, or an apprehension of danger, as a result of the incident in question.

In doing so, he follows *Campbell* and *Keen*, although no reference is made to these cases in *Anderson*. Oddly, the only one of the recent Scottish cases to be cited in *Anderson* is *Salter*, but no reference is made to the way in which Temporary Judge Reid defined primary victims in *Salter*, the case being cited in a different context.³²

Under Lord Drummond Young’s definition of a primary victim, it is unlikely that the pursuer in *Anderson* would be able to recover as there was no evidence that he was in physical danger or perceived himself to be so. Lord Drummond Young accepts this but moves on to state that the pursuer may nonetheless be able to recover if he has been “instrumental in another person’s death, or possibly serious injury, and that

²⁷ At para 27, emphasis added.

²⁸ D Kinloch, “*Salter v UB Frozen and Chilled Foods Ltd*” 2003 SLT (News) 261 at 261.

²⁹ [2006] CSOH 101, 2006 SLT 815.

³⁰ *Anderson* at para 3.

³¹ Para 8.

³² That of the pursuer who suffers psychiatric injury after thinking that he has caused death or injury to another – see the discussion below.

has caused him psychiatric harm”.³³ It is on this basis that the case was allowed to proceed to proof.³⁴

In reaching this conclusion, Lord Drummond Young relies in part on Lord Oliver in *Alcock*, who, as we have already seen, did regard instances where the plaintiff was “the involuntary cause of another’s death or injury” as cases where primary victim status might be conferred.³⁵ Lord Drummond Young also relies on *Salter*, describing this as “[t]he last reported decision dealing with this category of loss”.³⁶

The trouble with this is that it is not at all clear that the “involuntary cause” route to primary victim status is an accepted one. In *Alcock*, Lord Oliver relied on three cases in reaching his conclusion: *Dooley v Cammell Laird & Co Ltd*,³⁷ *Galt v British Railways Board*,³⁸ and *Wigg v British Railways Board*.³⁹ These do all seem to be cases in which a plaintiff was allowed to recover for psychiatric injury after thinking that he had caused (or was about to cause) death or injury. However, the plaintiff’s fear that he had killed a passenger on the train he was driving was not the reason for the decision in *Wigg*, which, insofar as it is possible to tell from the brief case report, was decided on the basis that the plaintiff was a rescuer. *Galt* is reported so briefly that little can be gleaned about the basis for the decision but there is no mention of the plaintiff’s fear that he had killed two men on a railway line as being a significant factor.

Dooley does appear to have been decided on the basis that it is reasonably foreseeable that someone who fears he has caused injury to his fellow workmen might himself suffer psychiatric injury,⁴⁰ but as it is a first instance decision from before even the House of Lords case of *McLoughlin*, it is of limited value as an authority.

Lord Oliver’s analysis of *Dooley*, *Galt* and *Wigg* was described by Lord Hoffmann in *White* as “an *ex post facto* rationalisation of the three English cases” that “owes nothing to the actual reasoning (so far as we have it) in any of the cases”.⁴¹ Lord Hoffmann does not rule out treating such cases as exempt from the *Alcock* control mechanisms, stating that “there may be grounds”⁴² for doing so, but at best he can only really be said to have left the question open, given that this was not a point that arose on the facts in *White*. This certainly seems to be the conclusion reached by leading English texts on tort.⁴³ In *Anderson*, Lord Drummond Young did recognise the limits of *Alcock* as an authority but went on to point to *Salter* as a Scottish case where the pursuer had been allowed to proceed to proof on the basis of the “involuntary cause” exception.

The difficulty here is that this was *not* the basis upon which *Salter* was decided.

³³ Para 8.

³⁴ Para 9.

³⁵ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at 408 per Lord Oliver.

³⁶ Para 8.

³⁷ [1951] 1 Lloyd’s Rep 271.

³⁸ (1983) 133 NLJ 870.

³⁹ *The Times*, 4 February 1986. The case is also reported very briefly at (1986) 136 NLJ 446, but only in the context of quantum of damages.

⁴⁰ See *Dooley* at 277.

⁴¹ *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 at 507-508.

⁴² At 508.

⁴³ M Lunney and K Oliphant, *Tort Law: Text and Materials* (2000) 295; M A Jones, *Textbook on Torts*, 8th edn (2002) 163; P Giliker and S Beckwith, *Tort* (2004) 121.

This is clear from the following passage in *Salter*, where Temporary Judge Reid stated that:⁴⁴

In my opinion, on the assumed facts, the pursuer is a primary victim *because he was actively involved in the accident which led to the death of his fellow employee*. He has averred (but did not need to for the purposes of establishing the existence and scope of the duties of care upon which he founds) that he blamed himself for the accident ... It is not a necessary ingredient to establish the existence and scope of any duty on the part of his employers to take reasonable care to avoid causing him psychiatric injury that he either blamed himself for the accident or that he was within the range of foreseeable physical injury.

Instead, as we have already seen, Temporary Judge Reid allowed the case to proceed to proof on the basis that the pursuer fell within the *Alcock* definition of a primary victim as someone who was “an active participant in the accident”, an aspect of *Salter* that is not mentioned in *Anderson*, where the *White* definition is preferred.

E. THE PRIMARY/SECONDARY VICTIM DISTINCTION: WHERE TO NOW?

In England and Wales, opinion is divided on whether *White* settled the question of how a primary victim should be defined. On one hand, Stephen Todd has concluded that *White* has “remov[ed] uncertainty in the definition of primary victim” and that “the law has at least been clarified”.⁴⁵ Donal Nolan, however, recently described *Alcock* and *Page v Smith* as “rival lines of authority, which add to the complexity of the law”.⁴⁶ In *North Glamorgan NHS Trust v Walters*,⁴⁷ the Court of Appeal used the *Alcock* definition⁴⁸ and in *W v Essex County Council*,⁴⁹ Lord Slynn remarked that “the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations.”⁵⁰

In Scotland, the position is no clearer and *Anderson* does little to clarify matters. Admittedly it adds to the balance of authorities which have adopted the *White* definition of a primary victim.⁵¹ But in another part of the judgment, *Anderson* relies heavily on *Salter*, a case where the *Alcock* definition was favoured, although this aspect of *Salter* is not mentioned anywhere in *Anderson*. Instead, Lord Drummond Young classifies *Salter*, incorrectly, as a case that was decided on the basis of the “involuntary cause” route to primary victim status. But, as we have seen, the status of this branch of the law is far from certain.

44 *Salter v UB Frozen and Chilled Foods Ltd* 2004 SC 233 at para 27, emphasis added.

45 Todd (n 19) at 347.

46 D Nolan, “Psychiatric injury at the crossroads” (2004) *Journal of Personal Injury Law* 1 at 7.

47 [2002] EWCA Civ 1792.

48 *Walters* at para 12 per Ward LJ.

49 [2001] 2 AC 592.

50 At 601.

51 Following *Keen* and *Campbell*, although not explicitly.

The Scottish Law Commission has recently published a report in this area⁵² and at some point legislative reform may follow. The Commission attempts to escape the terminology of primary and secondary victims, recommending that the distinction be abolished.⁵³ However, the Commission also recommends that those who “*were not directly involved in an incident* resulting from the defender’s wrongful conduct”⁵⁴ should only be able to recover if psychiatric injury (or, as the Commission prefers, “mental harm”)⁵⁵ was reasonably foreseeable *and* the pursuer had a close relationship with the person who was killed and injured.⁵⁶ In effect this is the adoption of something close to the *Alcock* distinction between primary and secondary victims, albeit with fewer restrictions placed on the claims of those who are not “directly involved”.⁵⁷

One thing that *Anderson* does demonstrate is that the precise boundaries of the primary/secondary victim distinction remain unclear. The distinction has been drawn in the case law at least in part for policy reasons – to restrict the ambit of liability and thus to prevent the floodgates from opening.⁵⁸ But floodgates arguments have been rejected by some as unconvincing in this context,⁵⁹ provided that a requirement for the pursuer to have suffered a recognised psychiatric illness is in place. There may be something to be said for the suggestion that Scots law abandon the primary/secondary victim distinction altogether and decide cases according to the normal rules of delictual liability – on whether or not the pursuer’s psychiatric injury was reasonably foreseeable.⁶⁰

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The author would like to thank James Chalmers for commenting on an earlier draft.

52 Report on *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004).

53 Para 3.3.

54 Para 3.15, emphasis added.

55 See paras 1.8 and 3.8.

56 Paras 3.15, 3.54.

57 For critical comment, see D Nolan, “Reforming liability for psychiatric injury in Scotland: a recipe for uncertainty?” (2005) 68 MLR 983 at 991.

58 *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at 417 per Lord Oliver; *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 at 494 per Lord Steyn.

59 Nolan (n 57) at 994; M A Jones, “Liability for psychiatric illness – more principle, less subtlety?” (1995) 4 *Web Journal of Current Legal Issues*.

60 Kinloch (n 28) at 262; B J Rodger, “Recovery for ‘nervous shock’” (1998) 2 EdinLR 100 at 105-107.