RESCUERS AND NERVOUS SHOCK

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The common law has long recognised the right of rescuers to sue an initial tortfeasor for physical injuries suffered in the course of effecting a “rescue” of persons injured by the negligence of others. This right is not so clear when the injury complained of is nervous shock. The United Kingdom Court of Appeal decision in Frost v Chief Constable of the South Yorkshire Police; Duncan v British Coal Corp [1997] 1 All ER 540 has added further confusion to this area of law. This article considers the right of the rescuer to receive compensation for nervous shock and argues that this decision does not represent good law and should not be followed in Australia.

The common law recognises that people who expose others to danger owe a duty of care, not only to those who may be immediately and directly affected by their acts and omissions¹ but also to those who may come upon the scene in order to “rescue” the victims of their negligence.² Where the rescuer suffers a physical injury, there is little controversy over the obligation of the initial tortfeasor to compensate the rescuer for the injuries sustained. It does not matter if the rescuer is a professional or a volunteer “good samaritan”.³ As Cardozo J said in Wagner v International Railway Co:

“The cry of distress is the summons to relief ... The wrongdoer may not have foreseen the coming of the deliverer. He is accountable as if he had.”⁴

Lord Denning, in Videon v British Transport Commission said: “Whoever comes to the rescue, the law should see that he does not suffer for it.”⁵

The right of a rescuer to sue the initial tortfeasor and recover damages for physical injury is therefore not in doubt. The issue becomes more complex however if the rescuer’s injuries are psychological rather than physical, that is, if as a result of being involved in a difficult “rescue” the rescuer suffers “nervous shock” rather than physical injury.

In the area of nervous shock it is necessary to distinguish between a “primary victim” and a “secondary victim” of the incident.⁶ A primary victim is a person who is present at the scene of the accident and is exposed to physical danger or at least reasonably believes that they are in danger of physical injury.⁷ If they suffer a psychiatric injury, even if they suffer no physical injury,⁸ then they are entitled to recover damages in the normal application of the law of negligence.

A secondary victim is someone who comes upon the scene of the accident, or its aftermath,⁹ is an active participant, not a mere bystander,¹⁰ and as a result of their experiences, suffers a psychiatric illness.¹¹ A secondary victim is not exposed to a risk of physical injury. In the case of secondary victims, the law imposes “control tests” which relate to the duty of care owed by the defendant to the plaintiff.

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The first control test is concerned with the question of “to whom is a duty of care owed?” That is, what is the “class” of persons who can recover for nervous shock. The defendant does not owe a duty to the world at large to prevent people seeing shocking sights, so a mere bystander who witnesses or comes across an accident between strangers will not recover, even if they do suffer “nervous shock”. The duty of the defendant only extends to those people who the law considers have a sufficiently close relationship to warrant the finding that the defendant owed them a duty to avoid injury by way of nervous shock. The traditional class of secondary victims entitled to recover for nervous shock are the relatives of the injured.

The second control test deals with the question of the extent of the duty owed. Where a person is exposed to a risk of physical danger, there is a duty to avoid all injuries. If it is foreseeable that a physical injury may occur, but a psychiatric injury in fact occurs, the liability is still established as it is not generally necessary that the exact injury, or cause of injury, be foreseeable. If some injury is foreseeable, that is usually sufficient to establish a duty of care so that if another, unforeseen injury occurs, the plaintiff may still recover damages. In nervous shock cases however, where there is no risk of physical injury (that is where there is a secondary victim) the law requires that the plaintiff show that the circumstances were such that nervous shock, as a particular type of injury was foreseeable.

There is a third control that requires that there be sufficient physical and temporal connection between the initial accident and the observations of its effects by the plaintiff, but this will pose little difficulty for rescuers who attend the scene to treat and remove the victims.

All of these tests may be accommodated by the term “proximity” so that the defendant will only owe a duty of care to a person with whom there is sufficient proximity. In nervous shock cases this will be established where it can be shown that the attendance at the accident site or its aftermath by the plaintiff (or by the class of persons to which the plaintiff belongs) was to be expected, in circumstances where it was foreseeable that injury by nervous shock may be suffered. Where the plaintiff is a mere bystander, or the circumstances are such that it was not foreseeable that nervous shock would develop, then the defendant owes the plaintiff no duty of care so that the plaintiff cannot recover even if nervous shock does, in fact, develop.

It has been recognised that rescuers may recover for nervous shock but the justification for this is not clear. Is it because they are deemed to be primary victims even though they would not usually be at risk from the initial accident (in which case the concept of “primary victim” is being extended in accordance with the policy that rescue should be encouraged) or is it because they are “secondary victims” but their role as a “rescuer” provides sufficient proximity to warrant the award of damages even though they are not personally related to the primary victim?

In Pratt and Goldsmith v Pratt and McFarlane v EL Caledonia Ltd the dicta of the judges suggest that rescuers should be considered as primary victims. That is, they should be considered as persons who are direct participants in the event, so that just as they would be entitled to compensation if they were physically injured, so too are they entitled to compensation if they suffer a psychiatric injury.

Other cases suggest that the rescuer who suffers only a psychiatric injury is to be considered as a secondary victim. These cases do not explicitly say that this is the case, but they generally class rescuers along with family members suggesting that they are to be considered in the same legal position as these secondary victims.

The English Court of Appeal had to consider the issue of rescuers and nervous shock in the cases of Frois v Chief Constable of the South Yorkshire Police and Duncan v British Coal Corp. The first case involved claims for nervous shock suffered by police officers at the Hillsborough Football Stadium in 1989 when 96 people were crushed to death and some 400 injured. The police in this case were not directly in the area of the crushing but were assisting at the scene. In Duncan the plaintiff worked as a pit deputy when a fellow worker was crushed to
death. The plaintiff attended the accident and attempted to revive his colleague but was unsuccessful. In both cases the plaintiffs sought compensation on the basis that they were rescuers.

Rose LJ and Henry LJ both took the view that “rescuers” were to be considered as primary victims and therefore were entitled to recover without the need to prove that psychological injury, as a particular type of injury, was foreseeable. According to Rose LJ, this categorisation was appropriate “because the court has long recognised a duty of care to guard employees and rescuers against all kinds of injury” that is, both physical and psychological injury.

As a primary victim, any injury to a rescuer is compensable, however Rose LJ went on to define rescuer very narrowly. Although he said, “[w]hether a particular plaintiff is a rescuer, is in each case, a question of fact to be decided in the light of all the circumstances of the case”, he placed undue reliance on the issue of whether or not the plaintiff was exposed to physical danger. For example, he found that a police officer was not a rescuer even though he attempted to resuscitate a person as he was “not sufficiently involved in the crushing incident or its immediate aftermath”. He found that Duncan was not a rescuer because by the time he arrived at the scene, the man had been released and Duncan, who performed cardiopulmonary resuscitation for two hours, was not in physical danger.

“What he did was proximate in time to the trapping of the deceased, but he was not geographically proximate when that incident occurred. When he arrived at the scene, there was no danger to him or to the deceased. . . . he was outside the area of risk of physical or psychiatric injury when the deceased was injured and he was not exposed to any unnecessary risk of injury when he attended the scene.”

With respect to the learned judge, this conclusion does not pay due regard to Duncan’s efforts to save his colleague. Clearly Duncan did not, as the trial judge said, see an “inanimate body”, rather he saw a person who he believed was critically injured. If Duncan had believed the man to be dead, he would not have commenced cardio-pulmonary resuscitation in an effort to save his life. Clearly Duncan believed that there was great danger to the deceased, namely danger that he would die if he did not receive adequate first aid. Duncan, to use the words of Evatt J from Chester v Council of the Municipality of Randwick was “endeavouring to save life or to prevent or mitigate the injurious consequences of the defendant’s primary breach of duty”. Evatt J also said:

“the rescuer is not debarred from recovery because in the light of after knowledge it is plain that his attempt at rescue could never have aided the victim of the defendant’s primary negligence.”

In Duncan’s case, the plaintiff was attempting to ameliorate the effect of the defendant’s negligence by attempting to save the man’s life. It should have been no bar that, unknown to Duncan, his attempts would be ineffectual. The court should have found that Duncan was a rescuer, and on Rose LJ’s reasoning, a primary victim. This would have entitled him to compensation for nervous shock.

Although Rose LJ said that all rescuers are to be considered primary victims, he limited the class of persons to be considered “rescuers” to those who are exposed to physical danger only. That has the effect of merging the classes of potential plaintiffs, so that the concept of “rescuer” becomes otiose. According to Rose LJ’s analysis, the only relevant question is: “Was the person exposed to a risk of physical danger or not?” The issue of whether they are a rescuer, on this analysis, is irrelevant, but that is clearly against the weight of authority. Henry LJ agreed with Rose LJ in the result but his reasoning appears to confuse primary and secondary victims. His Lordship said:

“I believe that where a plaintiff is a direct victim because of the duty that either his employer or the tortfeasor owes to him, that that should be the first head of recovery to be considered, because it might be wider and
will not (so far as I can foresee) be narrower than any entitlement as a rescuer.

Dealing with the entitlement of a rescuer it seems to me that public policy favours a wide rather than a narrow definition, to ensure that those brave and unselfish enough to go to the help of their fellow men will be properly compensated if they suffer damage as a result.29

A tortfeasor owes a duty of care to a rescuer30 so a rescuer plaintiff may be a direct (or primary) victim because of the independent duty owed to him or her by the initial tortfeasor. This is an independent duty owed to all who may come to assist, so Henry LJ’s first paragraph includes rescuers and should, therefore, see them classed as primary (or direct) victims.

It is unclear what the second paragraph means. He does not explain why, if there is to be a wide definition of rescuer, he concurs with Rose LJ’s narrow definition or why Duncan was not considered a rescuer.

Judge LJ took a wide view of who is a rescuer. He said:

"'rescue' and 'rescuer' are concerned with much wider activities than the words themselves may suggest. Those who respond to an emergency not by rushing to the immediate scene of an actual or impending disaster to alleviate it, but by taking part in a drawn out operation to look and search for those who are apparently lost ('searchers') also fall within the ambit of the principle."31

Merely categorising a person as a "rescuer" does not, in Judge LJ’s view, answer the question of whether they are a primary or secondary victim. That classification depends upon whether or not there is a risk of physical danger to the rescuer. If there is physical danger, then the rescuer is a primary victim and can recover for all injury, physical or psychological. If there is no physical danger then the victim is a secondary victim and must show that psychiatric injury was foreseeable in the circumstances. Judge LJ then went on to hold that if a rescuer is a secondary victim, that is, if they are not exposed to physical danger, then it is necessary to show that there was a close personal relationship between the rescuer and the rescued. With respect to his Honour, that is also wrong.

Traditionally the control tests for secondary victims do require that a secondary victim have some close personal relationship with the primary victim in order to ensure that mere bystanders do not recover. It is not, however, the definition of the relationship that counts32 but the existence of a relationship that makes it reasonable to foresee that the secondary victim will come to the scene of the accident.33 The close relatives of the victim is one class of persons that it is foreseeable may come to the scene of an accident or its aftermath and upon observing the damage done to their close family, suffer "'nervous shock'." Another class of persons that may recover are servants or employees who come to the aid of another person injured at their work.34 Yet another class of persons that may be expected to come to the scene of an accident or emergency and be exposed to the risk of "'nervous shock'" is rescuers. Rescuers do not need to show that they have a close tie with the victim, the fact of being a rescuer brings them within sufficient proximity35 so that all that is left to establish is that injury by way of nervous shock, as a type of injury, was foreseeable.

Again, the decision by Judge LJ makes the classification of a person as a rescuer otiose. If they are exposed to physical injury, then they are a primary victim, whether or not they are a rescuer, and entitled to compensation. If they are not exposed to physical injury, according to Judge LJ, they are a secondary victim and must show close personal ties to the primary victim, again irrespective of whether or not they are a rescuer. On this analysis the categorisation of a person as "rescuer" is irrelevant but again this goes against the weight of authorities that have found that being a rescuer is important, even if they have not spelled out exactly how that categorisation affects a right to compensation.

The decision in Frost does not therefore represent good law and should not be followed in Australia. To define who is a rescuer by reference to whether or not they are exposed to physical danger is to merge the definition of rescuer with the definition of primary victim, so
the critical question is exposure to physical danger and the fact that the person is acting as a rescuer becomes irrelevant. To hold that a rescuer must show that they have a close relationship with the rescued is, again, to make the fact that the person is acting as a rescuer irrelevant. The critical issue becomes their personal relationship with the victim.

The better view, from the Australian cases, is that “rescue” and “rescuer” are to be defined widely so that all the participants in these cases should have been regarded as rescuers. The courts would do well to adopt Evatt J’s definition of “rescuer”, as any person who is “endeavouring to save life or to prevent or mitigate the injurious consequences of the defendant’s primary breach of duty”.36

If it is established that a person is a rescuer (widely defined), then it is open on the authorities for a court to find that the fact of being a rescuer makes one a primary victim who is entitled to receive compensation for all injuries, physical or psychological, or, alternatively to hold, as Judge LJ in Frost did, that the issue of primary or secondary victim turns on the question of whether there is a risk of physical danger.

If all rescuers are primary victims, then they will be entitled to compensation for their injuries, both physical and psychiatric. This will be true as it is foreseeable that a rescuer may be exposed to physical danger37 and so the defendant has breached his or her duty of care to the rescuer when they caused the initial accident. It will be no bar to the primary victim’s claim that the exact injury was not foreseen and so recovery may be allowed38 without the need to prove that nervous shock was foreseeable as a particular type of injury. Even if the only person in need of rescue is the initial tortfeasor, the rescuer, as a primary victim, would be able to recover for nervous shock as the person who exposes only themselves to danger owes a duty of care to their rescuer.39

On the other hand, if it is decided that a rescuer is a secondary victim then it should be clear that the fact that the person is a rescuer creates sufficient proximity between the rescuer and the initial tortfeasor to allow the rescuer to recover for nervous shock provided that injury by nervous shock was foreseeable and without the need to show any particular relationship (other than rescuer) between the rescuer and the rescued.

However, holding that whether a rescuer is a primary or secondary victim depending on whether or not they are exposed to physical danger may lead to some absurd results. Assume that a car is negligently driven into a tree. The local rescue squad and ambulance attend the accident. The members of the rescue squad climb into the wreck and extricate the driver whilst the ambulance officers wait until the driver is removed and then commence to provide first aid. The rescue crew may be considered “primary victims” as there is a risk that they may suffer a physical injury in climbing into the wreck, accordingly the rescuer who develops a psychiatric injury can recover damages from the driver’s insurer in the same way that the rescuer who suffers a cut hand can. The ambulance officers, on the other hand, who wait for the victim to be removed before commencing treatment would be secondary victims. They would not recover for psychiatric injury unless they could show that the circumstances were such that a person of normal fortitude might, as a result of observing what they saw, develop psychological injury.

Further, in Jaensch v Coffey41 Deane J said that with respect to claims for nervous shock by secondary victims, the plaintiff may only recover if the negligence of the defendant leads to injury to a third party, that is an injured person is not liable for nervous shock suffered by another when they have caused their own injuries (whether negligently or intentionally). For the ambulance officers in the above example, this would mean that they could only recover if their nervous shock was induced by the injuries sustained by someone other than the driver.42 They could not recover if their “shock” was caused by observing the horrific injuries of the driver at fault. The rescue officers, however, as primary victims, could recover even if the only person injured was the driver at fault.43

If the law were to adopt the broad view of who is a rescuer, and also to adopt the view that all rescuers, by virtue of their role as rescuers, were to be considered primary victims
of the tortfeasor’s initial negligence, then both ambulance officer and rescue squad member, as well as a passing volunteer would be entitled to recover for any psychological illness suffered. This would reflect the policy contained in Lord Denning’s statement that “[w]hoever comes to the rescue, the law should see that he does not suffer for it” and Henry LJ’s statement that “public policy favours a wide rather than a narrow definition of rescuer,” to ensure that those brave and unselfish enough to go to the help of their fellow men will be properly compensated if they suffer damage as a result.

That such a conclusion would represent a sound policy decision may not be sufficient to determine the matter where the authorities remain unclear on how rescuers are to be classified. What is clear is that the decision in Frost was wrong, because according to the decision of all the judges in that case, the question of who is a rescuer and what duty is owed to them was reduced to an irrelevancy. The decision in those terms was against the policy of the law and the weight of the authority. It remains to be seen however, what later courts may do with the classification of rescuers, but it is hoped that, at least in Australia, the decision in Frost will not be followed.

Endnotes

1 Doneghue v Stevenson [1932] AC 562.
4 133 NE 437 at 437-438 (NY 1921).
5 [1963] 2 QB 650 at 669.
7 McFarrane v EE Caledonia Ltd [1994] 2 All ER 1 at 10 per Stuart-Smith LJ.
11 Ibid at 422 per Lord Wilberforce; see also Jaensch v Coffey (1984) 155 CLR 549 at 572 per Brennan J.
12 Bowhill v Young [1943] AC 92.
14 Ibid at 607; McLoughlin v O’Brien [1983] 1 AC 410 at 422.
16 [1994] 2 All ER 1.
17 See also Alcock v Chief Constable [1992] 1 AC 310 at 408 per Lord Oliver.
18 Mt Isa Mines v Pusey (1971) 125 CLR 383; Chester v Council of the Municipality of Waterley (1939) 62 CLR 1 at 38 per Evatt J; Alcock v Chief Constable [1992] 1 AC 310 at 421 per Lord Jauncey; Jaensch v Coffey (1984) 155 CLR 549 at 555 per Gibbs CJ; 569 per Brennan J; 610-611 per Deane J.
19 Frost v Chief Constable of the South Yorkshire Police; Duncan v British Coal Corp [1997] 1 All ER 540 (the appeals in these matters were heard together).
20 Ibid at 549-550 per Rose LJ; 558 per Henry LJ.
21 Ibid.
22 Ibid.
23 Ibid at 550.
24 Ibid.
25 Ibid at 554.
26 Ibid at 553.
27 Chester (1939) 62 CLR 1 at 37-38. Although Evatt J was in the minority in this case, his judgment was approved in McLoughlin v O’Brien [1983] 1 AC 410 and in Jaensch v Coffey (1984) 155 CLR 549 at 590 per Deane J, who said: “it must now be accepted that the conclusion of Evatt J is, on the facts in Chester, plainly to be preferred to that of the majority.”
28 Chester (1939) 62 CLR 1 at 38.
29 Frost [1939] 1 All ER 540 at 567-568.
31 Frost [1939] 1 All ER 540 at 569.
33 Chester (1939) 62 CLR 1 at 44 per Evatt J; Jaensch v Coffey (1984) 155 CLR 549 at 569 per Brennan J.
34 Mt Isa Mines v Pusey (1971) 125 CLR 383.
36 (1939) 62 CLR 1 at 37-38.
40 One could assume that here the test should really be the “rescuer of normal fortitude” which may have implications for professional rescuers. It may be expected that a person who is a professional,
career rescuer, such as a member of the professional fire brigades or ambulance services may be able to withstand more than a normal "good samaritan". It may be foreseeable that a lay person will suffer nervous shock on seeing a person badly burned, but would one foresee the same outcome for a professional fire fighter? These issues would need to be considered in a given fact situation, but the courts have been reluctant, when formulating legal principle, to distinguish between the professional and the volunteer rescuer: see Ogwo v Taylor [1988] 1 AC 431; Frost [1997] 1 All ER 540 at 550-551 per Rose LJ; 568 per Judge LJ.

43 Harrison v British Railways [1981] 3 All ER 679.
45 Frost [1997] 1 All ER 540 at 567-568.