

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE MANCHESTER COUNTY COURT**  
**HIS HONOUR JUDGE TETLOW**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 7<sup>th</sup> April 2004

**Before :**

**LORD JUSTICE AULD**  
**LORD JUSTICE LATHAM**  
and  
**LADY JUSTICE ARDEN**

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**Between :**

**DAVID L DONACHIE**  
- and -  
**THE CHIEF CONSTABLE OF THE GREATER  
MANCHESTER POLICE**

**Appellant**

**Respondent**

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Mark Turner QC (instructed by **Betesh Fox & Co**) for the Appellant  
Andrew Edis QC and William Waldron (instructed by **Weightmans**) for the Respondent

Hearing date : 16<sup>th</sup> February 2004  
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**JUDGMENT**

## **Lord Justice Auld:**

This is an appeal by David Donachie against the order of His Honour Judge Tetlow on 28<sup>th</sup> February 2003 in the Manchester County Court dismissing his claims in negligence and for breach of statutory duty against the Chief Constable of Manchester for damages for personal injuries when serving as a police officer in the North West Regional Crime Squad. The appeal is against the Judge's rejection of his claims for want of reasonable foreseeability of his injuries, the Judge having found in his favour on the issues of breach of duty and causation. The Chief Constable, by a respondent's notice, seeks to uphold the Judge's finding on the issue of reasonable foreseeability and, by way of cross-appeal to challenge his finding on the issue of causation.

## **The facts**

On the evening of 2<sup>nd</sup> November 1997 Mr Donachie was required, in the course of his duty, to attach a tagging device to the underside of a car that the Crime Squad believed belonged to a gang of criminals. The car was parked in a street behind the public house in which the suspected criminals were drinking. Mr Donachie was one of a group of officers detailed to carry out the operation. Normally, to avoid discovery while attaching the device, they would have done it in the early hours of the morning when the suspects could be expected to be asleep. However, this operation was urgent – hence the unusual and more risky timing of it.

The system operated by the officers was that one of them – in this instance Mr Donachie – would attach the device to the underside of the car while the others kept watch from in and around a police “tracking” van against the possibility of the suspects emerging from the public house and catching him in the act. If all had gone well, he should have been able to approach the car, get underneath it and attach the device out of sight and walk away; and the device should have immediately begun recording signals to the tracking van. Unfortunately, and unknown to Mr Donachie and his fellow officers, the device was fitted with a battery, which, although newly fitted and used earlier that day on another vehicle, had failed. When Mr Donachie attempted to attach it to the car, it did not operate so as to give a signal. He had to return to the car, retrieve it and take it back to the van where he and his colleagues attempted to find out what was wrong with it and make it work. They did not know whether the device or Mr Donachie's positioning of it under the car or the battery caused the malfunction. Having examined and fiddled with the device, he then had to go back to the car, get under it again and try again to attach it in a position where it would work. However, again it did not do so, and it continued to fail until after two battery replacements and seven more trips by him to the car. He was eventually successful on the ninth trip in attaching the device in working condition.

With every approach that Mr Donachie had to make to the car, he subjected himself to an increased risk of being caught in the act and attacked by the suspects, if they left the public house and saw him underneath or close to the vehicle. On his account, he became increasingly frightened, fearing serious injury or even death if the suspects saw what he was doing. He and all the other officers with him considered that it was the most stressful operation of this sort that they had ever experienced.

However, they were not the only officers in the Squad to experience difficulties of this sort with the tagging devices issued to them for such a purpose. There was an established history of problems with the batteries provided with the devices; about 30% of new batteries failed. Those responsible in the Greater Manchester Force for

issuing them knew or ought to have known of the problem. But no evidence was called on behalf of the Chief Constable at the trial to suggest that they had done much, if anything, about it, for example by introducing a simple system of checking the batteries before issuing them with the device for a tagging operation.

Mr Donachie already suffered from hypertension rendering him particularly vulnerable to stressful conditions, though those for whom the Chief Constable were responsible knew nothing of that. The whole operation, which, as I have said, put him in great fear, aggravated that hypertension causing extreme stress. As a result, on the medical evidence accepted by the Judge, he developed a clinical psychiatric state, leading to an acute rise in blood pressure, which caused a stroke.

The Judge found:

that the Chief Constable was negligent in failing to operate a safe system of work and was in breach of statutory duty in failing to provide equipment that was in an efficient state;

that there was an unbroken chain of causation between those breaches of duty and the stroke, consisting of:

Mr Donachie's fear of serious physical injury from attack by the suspected criminals should they discover him interfering with their car during the repeated visits to the car necessitated by the breaches;

the aggravation thereby caused to his already stressed condition;

consequent clinical psychiatric injury, contributing to

the stroke;

but that, as he suffered no physical injury of the sort that he had feared, namely in the form of an attack by the suspected criminals, and as the psychiatric injury giving rise to his stroke was not reasonably foreseeable because of the Chief Constable's non-culpable ignorance of his vulnerability to stress, he had suffered no reasonably foreseeable injury;

his claims in negligence and for breach of statutory duty both failed.

Mr Donachie appeals the Judge's finding that his injury was not reasonably foreseeable, maintaining that the Judge applied the wrong test of reasonable foreseeability to the facts of the case. The Chief Constable, by a respondent's notice, seeks to uphold the Judge's dismissal of the claim on that ground and also on the ground that he should not have found causation established. The Chief Constable also raises certain arguments as to the applicability and effect of the relevant statutory provisions, which do not in the event require determination in the appeal.

## **The issues**

The appeal raises three issues, all of them overlapping:

whether the Judge, on his own findings, overlooked the fact that there was a reasonably foreseeable risk of *physical* injury and, therefore, wrongly treated Mr Donachie as if he were a secondary victim claiming damages for

psychiatric injury for whom it was necessary to establish some sort of an “an event” for which the Chief Constable was culpably responsible, rather than a primary victim whose claim included damages for physical injury for whom proof of such an event was not necessary;

whether, on the issue of reasonable foreseeability, the Judge wrongly took into account Mr Donachie’s particular vulnerability to stress by reason of his pre-existing hypertension; and

whether, on the issue of causation raised in the respondent’s notice, the test of causation of Mr Donachie’s injuries, psychiatric and/or physical, were caused by the Chief Constable’s negligence and/or breach of duty

### *Reasonable foreseeability of injury/proximity*

Mr Mark Turner QC, on behalf of Mr Donachie, put at the forefront of the appeal that the Judge, on his own findings, overlooked the fact that there was a reasonably foreseeable risk of physical injury. He submitted that the Judge wrongly relied on the test of foreseeability set out by this Court in *Sutherland v. Hatton* [2002] PIQR P221, where the claim failed because, the Court held, there was no reasonably foreseeable risk of injury of any sort. Here, he maintained, the Judge, having accepted that Mr Donachie had suffered a clinical psychiatric condition leading to a physical injury in the form of a stroke as a result of the Chief Constable’s negligence, wrongly failed to consider whether he was a primary or secondary victim. He said that if he had done so, he would have been bound by authority, in particular *Page v. Smith* [1996] 1 AC 155, HL, to conclude that he was a primary victim, since the Chief Constable should reasonably have foreseen the possibility of some physical injury whatever the precise mechanics of its causation.

In order to follow, and before continuing with, Mr Turner’s submissions on the issue of reasonable foreseeability, I should set out, at least in summary form, the main principles established by the House of Lords in *Page v. Smith*, the nature of the factual issue in the case and also a much cited passage from the speech in it of Lord Lloyd of Berwick. The main principles are that:

A defendant owes a duty of care to a person where he can reasonably foresee that his conduct will expose that person to a risk of personal injury.

For this purpose the test of reasonable foreseeability is the same whether the foreseeable injury is physical or psychiatric or both.

However, its application to the facts differs according to whether the foreseeable injury is physical or psychiatric. In the latter case, if the claimant is not involved in some sort of “event” caused by the negligence, he is a “secondary” victim and liability is more difficult to establish (see the recent discussion by the House of Lords in *Barber v. Somerset County Council* [2004] UKHL 13);

If the reasonably foreseeable injury is of a physical nature, but such injury in fact causes psychiatric injury, it is immaterial whether the psychiatric injury was itself reasonably foreseeable. Equally if, as in this case, the breach of duty causes psychiatric injury causing in turn physical injury, it is immaterial that neither the psychiatric injury nor the particular form of physical injury caused

was reasonably foreseeable. Thus, in *Page v. Smith*, the claimant was involved in a road accident caused by the defendant's negligence that caused him no physical injury, but aggravated a pre-accident condition of fatigue syndrome. The House of Lords upheld his entitlement, subject to establishing causation, to claim in damages for negligence. Lord Lloyd, applying the approach that I have just summarised from a passage from his speech at 190C-D, said at 190C-F:

. "... the test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to risk of personal injury. If so, then he comes under a duty of care to that plaintiff. If a working definition of 'personal injury' is needed, it can be found in section 38(1) of the Limitation Act 1980; "Personal injuries" includes any disease and any impairment of a person's physical or mental condition ..." .... In the case of a secondary victim, the question will usually turn on whether the foreseeable injury is psychiatric ... In the case of a primary victim the question will almost always turn on whether the foreseeable injury is physical.. But it is the same test in both cases, with different applications. There is no justification for regarding physical and psychiatric injury as different 'kinds' of injury. Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both. The utility of a single test is most apparent in those cases ... where the plaintiff is both primary and secondary victim of the same accident.

Applying that test in the present case, it was enough to ask whether the defendant should have reasonably foreseen that the plaintiff might suffer physical injury as a result of the defendant's negligence, so as to bring him within the range of the defendant's duty of care. It was unnecessary to ask, as a separate question, whether the defendant should reasonably have foreseen injury by shock; and it is irrelevant that the plaintiff did not, in fact, suffer any physical injury."

On the associated issue of proximity, Mr Turner criticised the Judge's reliance in rejecting Mr Donachie's claims, on the notion that he had to prove, not only that he had been exposed to a risk of physical injury from being assaulted by the suspected criminals, but also that an "event", say, in the form of such an assault had taken place. He suggested that such an approach was inconsistent with the principles laid down by the House of Lords in *Page v. Smith* and the Court of Appeal decisions following it of *Young v. Charles Church (Southern) Ltd.*, 24<sup>th</sup> April 1997, QBENF 96/0920/C; and *Schofield v. Chief Constable of the West Yorkshire Police* [1999] ICR 193, CA.

Looking at the facts of this case, Mr Turner submitted that it was not a pre-requisite of actionability that the suspected criminals should have intervened to attack Mr Donachie. There was clearly a risk that they would emerge from the public house at any time and that, if they saw him interfering with their car, they would attack him. The fact that, after the event, it is known that they did not do so, he maintained, is immaterial, since Mr Donachie is a primary victim and, as Lord Lloyd of Berwick

said in *Page v. Smith*, at page 197F, hindsight has no application to the claims of primary victims:

“In claims by secondary victims it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is a primary victim.”

And, on what Mr Turner called a “four square” application of Lord Lloyd’s test at 190F, set out above, it was enough to ask whether the Chief Constable should have reasonably foreseen that Mr Donachie might suffer physical injury as result of the negligence, so as to bring him within the range of the duty of care.

Mr Turner added that, even if it was necessary to identify some sort of an “event” for this purpose, the Judge’s distinction between injury caused by fear that the suspected criminals would emerge from the public house is indistinguishable from fear that Mr Donachie would have felt had they actually done so, save possibly as to degree.

Mr Andrew Edis QC, for the Chief Constable accepted that the Chief Constable had a duty to take all reasonable steps to protect Mr Donachie from physical injury caused by violent criminals, by the provision of a reasonable system for checking batteries provided for tracking devices. However, he maintained that:

there was no such duty to protect him from or to reduce work-related stress, since to impose it would fail the foreseeability and the fair, just and reasonable elements of the test in *Caparo Industries plc v. Dickman* [1990] 2 AC 605; and

although there is a duty of protection, whether from physical or psychiatric injury, which could become actionable in the event of criminals actually causing either or both forms of injury, there was no such event here, simply the claimed effect of stress upon Mr Donachie’s body. Thus, he submitted, in the events that did happen, as distinct from those that might have happened, there was no foreseeable risk of injury of any sort; so the Judge correctly applied the rule in *Sutherland v. Hatton*

Thus, he submitted, the notion of proximity raises no separate issue, for if Mr Donachie was negligently exposed to an event that carried a reasonably foreseeable risk of physical injury, there was sufficient proximity; otherwise not.

As to the first of his submissions, Mr Edis, whilst acknowledging that the *Page v. Smith* rule is a matter of principle and not, in general, fact sensitive, urged the Court to have in mind the factual context in which it arises for consideration in this case. He had in mind that the job of a policeman is, by its very nature, full of stress. A chief constable puts his officers in the way of danger whenever he sends them out on the beat. Here, Mr Donachie was an experienced officer in the Regional Crime Squad who had coped with duties in that capacity for many years. He was a man, submitted Mr Edis of whom the Chief Constable could reasonably expect a certain fortitude in the face of physical dangers to which his job exposed him. It was only if, on the facts, there could be said to have been reasonable foreseeability of physical injury from the Chief Constable’s breach of duty in relation to the defective batteries that the *Page v. Smith* rule would come into play. He said that there was a risk of physical injury to any officers engaged on such tagging duties, even if the batteries were not defective, a risk that went with the job. The question was whether it could be said that there was

reasonable foreseeability that that risk was materially increased by the provision of defective batteries in the sense of exposing him to imminent physical harm, as distinct from “manageable” or controllable risk of such harm. If not, such foreseeability could only relate to psychiatric injury and would justify the Judge’s approach in reliance on *Sutherland v. Hatton*. He relied for his proposition as to “imminence” of physical harm for this purpose on a number of authorities, including *Frost v. Chief Constable of Yorkshire* [1999] 2 AC 455 and *W v. Essex County Council* [2001] 2 AC 592, HL.

The tagging operation in this instance was not, he submitted one that involved a risk of such imminent physical danger as to constitute an “an event” in the sense of putting Mr Donachie in sufficient proximity to the foreseeable source of harm so as to be able to rely on the psychiatric injury giving rise to physical injury - as was, for example, the pregnant barmaid in *Dulieu v. White & Sons* [1901] 2 KB 669, who suffered nervous shock causing her to give premature birth as a result of the tortfeasor’s horse van bursting into her bar from the roadway.

The difficulty for Mr Edis in urging the Court to look at this case as one in which the defective batteries did not increase the reasonable foreseeability of physical injury normally inherent in a police tagging operation is that neither the evidence nor the Judge’s finding on that evidence supports it. The Judge, having carefully rehearsed the evidence, expressly found that it was reasonably foreseeable that, as a result of the malfunction of the batteries, the existing small risk in the operation would become considerably greater and the consequent stress to Mr Donachie severe or extreme. In paragraphs 30 and 56 of his judgement, he said:

“30. It is suggested by the Defendant that the Claimant is putting it too highly in saying that when he was on his back under the car he feared for his life. Even if his memory has been enhanced by reflection I have no doubt he feared despite the presence of the safety net he might be detected and suffer some unpleasant consequences namely injury if not death.”

“56. Was it foreseeable that battery failure or lack of implementation of a system for testing batteries created a foreseeable risk of harm? If there is a system or lack of a system which allows for unpredictable batteries to be deployed in devices under cars then it is to be expected and foreseeable that more than one trip to the target vehicle will be required before the device works. The more often a person has to go under a vehicle to fix a tag and the longer in total he is under that vehicle the greater the risk of discovery and assault even with a safety net in place. That was the more so in the instant case when the suspects were nearby and might approach the vehicle at any time. Therefore the increase in the risk of physical injury due to faulty batteries prolonging the time necessarily to be spent under the target vehicle was foreseeable. Each journey to the car increased the risk of discovery and assault. ....”

In my view, there is no basis on which this Court could go behind those findings, albeit that they are findings of secondary fact. Nor can I see any legal basis for Mr Edis’s

further and related submission that, even so, it is necessary for Mr Donachie, on a *Page v. Smith* approach, to prove that there is a reasonable foreseeability of *imminent* physical harm, as contrasted with exposure to a “manageable” or controllable risk of harm. None of the authorities to which Mr Edis referred the Court on this point begins to support this suggested qualification of the *Page v. Smith* principle.

The Judge, despite his findings on causation, approached the question of reasonable foreseeability of injury on the basis that the relevant injury was psychiatric injury, not physical injury of whatever sort. On that basis and because of his view that there was no “event”, in the sense of no assault, to which Mr Donachie had been exposed, and no reason for the Chief Constable to have known of any special vulnerability to stress, he was a secondary victim in respect of whom, reasonable foreseeability of stress giving rise to psychiatric injury was not enough to establish a breach of duty. This is how he put it, at paragraphs 59 – 61 of his judgment:

“59. The Defendant knew that tagging operations were stressful in general terms. The Defendant would be taken to know that getting under a car to fix a device would be stressful in the sense that there would be apprehension of discovery and more so if the driver and passengers were nearby and would at some stage return to the vehicle. The Defendant would in such circumstances foresee that the stress would be prolonged if not increased every time a return visit to the car was necessary. This throws me back to the case of *Sutherland v. Hatton* and the threshold question namely whether the kind of harm to this claimant was reasonably foreseeable bearing in mind that there are no occupations which should be regarded as intrinsically dangerous to mental health.

60. As I have already found, the Defendant did not know that the Claimant was suffering from hypertension or that it was poorly controlled or, as the cardiologists agree, that such had been the case from 1995 at least. In such circumstances it is difficult to see how the Defendant could be liable for any mental illness or the consequences thereof caused by stress induced by being under the car. Dr Johnson, the psychiatrist retained by the Defendant, accepts that if the Claimant felt intensely that he was at risk of injury whilst under the car such could trigger a psychiatric reaction or illness ... However, in the absence of knowledge that the Claimant had anything wrong with him which might predispose him to such mental illness it is difficult to see on the basis of *Sutherland* how the Defendant could reasonably foresee this problem arising. It could be argued that here the injury to health attributable to stress was physical not mental, namely stroke and therefore *Sutherland* would be of no assistance. It seems to me even so that the employer would need to know there was something about the Claimant’s state of health which would predispose him to such injury. The cardiologists agree that that the risk of stroke for ‘normal’ members of the population is slight. The Defendant therefore could not reasonably foresee a stroke for such a person if he did what the Claimant was doing on 2

November 1997. The cardiologists agree that raised blood pressure increases the risk of having a stroke. ...I can accept Dr Levy's view that poorly controlled hypertension with prolonged levels of stress meant it was foreseeable that a stroke could follow. That does not avail the Claimant in the absence of knowledge of the Claimant's condition by the Defendant. Dr Levy reached the opinion that an episode of extreme stress could trigger a stroke even in a person with no history of raised blood pressure. ... That may be so but I do not think that that makes injury any more reasonably foreseeable in the instant case.

61. I conclude therefore that the Defendant is right in saying that the particular injury is not reasonably foreseeable or that it is too remote. Putting it another way I do not consider this is a *Page v. Smith* case. The event in *Page v. Smith* was a road traffic accident. The equivalent event in this case would have been the arrival of the villains on the scene. It is with some diffidence and reluctance that I have come to the conclusion that damages for this particular injury are not recoverable in negligence."

It is plain from *Page v. Smith* and the authorities following it that, in the case of claims for nervous shock or other form of psychiatric injury, the application of the test of reasonable foreseeability differs according to whether the claimant is a "primary" or a "secondary" victim. In the case of the latter the law accepts, but more reluctantly than in the case of the former, the possibility in certain cases of establishing reasonable foreseeability of injury. This reluctance, by the imposition of certain control mechanisms, has – as a response to the "floodgates" argument - its root in the policy of careful scrutiny of claims where the sole injury for which damages are claimed is psychiatric; see *McLoughlin v. O'Brien* [1983] 1 AC 410, HL, especially per Lord Scarman at 431 B-D.

However, where the court is satisfied that reasonable foreseeability has been established, whether for physical or psychiatric injury or both, it is immaterial whether the foreseeable injury caused, and in respect of which the claim is made, is caused directly or through another form of injury not reasonably foreseeable. Thus, as Lord Browne-Wilkinson indicated in *Page v. Smith*, at 181A-B, a negligent act may cause physical injury or illness either directly or through a psychiatric route, or it may cause psychiatric injury either directly and/or through direct physical injury or illness.

I agree with Mr Turner that the Judge, in the passages from his judgment that I have set out in paragraph 19 above, wrongly relied on *Sutherland v. Hatton*, a claim for occupational stress induced psychiatric injury that failed because there was no reasonably foreseeable risk of injury of any sort. This case was one in which, as I have said, there was a reasonable foreseeability that the Chief Constable's breach of duty would cause physical injury to Mr Donachie, though not of the kind he actually suffered, and via the unforeseeable psychiatric injury actually caused by his negligence. He was thus a primary victim in respect of whom there was a reasonable foreseeability of physical injury and, in consequence, in respect of whom it was not necessary to prove involvement in an "event" in the form of an assault or otherwise. There can be no doubt that the Judge, on his findings of fact that we have set out in

paragraph 18 above, was satisfied on the evidence before him that there was a reasonable foreseeability of physical injury.

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.

### *Pre-existing vulnerability*

This issue is part of the foreseeability issue, but as it was treated as a discrete area of argument by both Mr Turner and Edis, I shall give it the same focus as they did.

Mr Turner criticised the Judge’s reliance, in paragraphs 59 to 61 of his judgment (see paragraph 19 above), on Mr Donachie’s pre-existing hypertension as a symptom of his special vulnerability to stress and its mental or other consequences when considering the issue of reasonable foreseeability of injury. He noted too that there was no evidence that he was susceptible to psychiatric injury. He submitted that any such pre-existing vulnerability, whether to stress or psychiatric injury, was irrelevant to foreseeability, since the test is that a tortfeasor takes his victim as he finds him in cases of psychiatric injury as well as physical injury.

Mr Edis submitted that the pre-existing vulnerability of Mr Donachie is relevant to reasonable foreseeability because, unless the Chief Constable knew of it there was no reasonable risk of injury of any kind, and it is only where there is a foreseeable risk of physical injury that the tortfeasor must take his victim as he finds him. In developing that argument, he drew the following analogy from the facts in *Page v. Smith*. Driving a vehicle badly creates a foreseeable risk of injury if an accident occurs. All those involved in the “event”, that is, the accident may recover damages, whether for physical or mental injury, or both. But it does not follow from that reasoning that a person not the subject of such an “event”, who is, not involved in the accident, can recover damages for stress caused by their fear that there might be an accident.

If I am correct in my view that Mr Donachie is a primary victim because the Chief Constable’s breaches of duty gave rise to a reasonable foreseeability of physical injury, albeit of a different form from the one caused by those breaches, any pre-existing vulnerability of Mr Donachie to stress causative of psychiatric injury is irrelevant. The Chief Constable must take his victim as he finds him. Lord Lloyd, in *Page v. Smith*, said, at 197E-H:

“... In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not

be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim. ... Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not in fact, occur. There is no justification for regarding physical and psychiatric injury as different ‘kinds of damage’. ... A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.”

Accordingly, the fact that the Chief Constable was not, and could not reasonably have been expected to be, aware of any particular vulnerability of Mr Donachie, by reason of hypertension possibly causative of psychiatric injury, is no impediment to Mr Donachie’s claim under the heading of reasonable foreseeability or in causation. It follows for this reason too, that the Judge erred in his reasoning in paragraphs 59-61 of his judgment (see paragraph 19 above) that, because the Chief Constable had not been put on notice about Mr Donachie’s hypertension, all that followed from his breaches of duty on 2<sup>nd</sup> November 1997 was not reasonably foreseeable. That reasoning flowed from his basic error in concluding, as he put it in paragraph 61, that this was not “a *Page v. Smith* case”.

However, if, for the reasons I have given in paragraph 24 above, it had been necessary to consider the validity of the Judge’s conclusion that there was no reasonable foreseeability of psychiatric injury on account of Mr Donachie’s pre-existing vulnerability, I could not have upheld his finding. There was no evidence that he was vulnerable to psychiatric illness, only that his pre-existing hypertension predisposed him to a stroke, not to psychiatric injury.

There is no need to deal separately with the issue of breach of statutory duty, since, as Mr Turner conceded, the issues as to foreseeability in negligence are essentially the same as those arising for consideration under the relevant statutory provisions.

### *Causation*

The general rule in personal injury cases remains the “but for” test laid down by the House of Lords in *Bonnington Castings Ltd. v. Wardlaw* [1956] AC 613, as interpreted by the majority of the House in *McGhee v. National Coal Board* [1973] 1 WLR 1, a general rule that Lord Bingham reiterated in paragraph 8 of his speech in *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 AC 32:

“In a personal injury action based on negligence or breach of statutory duty the claimant seeks to establish a breach by the defendant of a duty owed to the claimant, which has caused him damage. For the purposes of analysis, and for the purpose of pleading, proving and resolving the claim, lawyers find it

convenient to break the claim into its constituent elements: the duty, the breach, the damage and the causal connection between the breach and the damage. In the generality of personal injury actions, it is of course true that the claimant is required to discharge the burden of showing that the breach of which he complains caused the damage for which claims and to do so by showing that but for the breach he would not have suffered the damage.”

As Lord Bingham went on to emphasise in paragraph 9 of his speech, the issue in *Fairchild* did not concern the general validity and applicability of that requirement, but whether in special circumstances such as those in that case there should be any variation or relaxation of it. Those circumstances were that the claimant had contracted mesothelioma following successive employments with two employers, each of whom was in breach of duty in exposing him to excessive quantities of asbestos dust, the only possible cause of his condition. In the state of medical science he was unable to prove which or whether both of his employers, by reason of their breach of duty, had caused his condition. Their Lordships, faced with the injustice of depriving him of recovery of compensation in such circumstances, held essentially on policy grounds that he should be entitled to recover against both employers on the *McGhee* basis that his employer, in exposing him to a risk to which he should not have been exposed, materially contributed to the injury against which his employer had a duty to protect him. Lord Nicholls of Birkenhead observed at paragraph 36 of his speech in *Fairchild* that the real difficulty lies in elucidating in sufficiently specific terms the principle to be applied in reaching that conclusion. And he later observed, at paragraph 43, that considerable restraint is called for in relaxation of the threshold “but for” test of causal connection.

The Judge’s findings on the issue of causation, which are to be found in paragraphs 53 to 55 and 62 to 71 of his judgment, were, in summary, as follows. The Greater Manchester Police Force had been using tagging devices of the type involved in this case for some two years. There was no evidence that the Force had any system for checking their efficiency or the state of the batteries fitted to them. The Force’s experience of using the devices was that they were not reliable and that, on occasion, they would not operate properly. They had a propensity either not to work at all when new – there was about a 30% rate of failure - or to cease working whilst in use and without warning. There was no means of testing whether a battery was defective before fitting it to a device. And, even when fitted, the only way of testing it before attaching it to a vehicle was to walk with it some two or three metres from the tracking police vehicle, something not normally done nor instructed - and not done in this instance. The significance of all this to the issue of causation can be seen from the observations of the Judge in paragraph 56 of his judgment, albeit that he was there dealing with foreseeability. I have already set out part of those observations in paragraph 18 above, but for convenience, I reproduce here the whole of paragraph 56:

“Was it foreseeable that battery failure or lack of implementation of a system for testing batteries created a foreseeable risk of harm? If there is a system or lack of a system which allows for unpredictable batteries to be deployed in devices under cars then it is to be expected and foreseeable that more than one trip to the target vehicle will be required before the device works. The more often a person has to go

under a vehicle to fix a tag and hence the longer in total he is under that vehicle the greater the risk of discovery and assault even with a safety net in place. That was the more so in the instant case when the suspects were nearby and might approach the vehicle at any time. Therefore the increase in the risk of physical injury due to faulty batteries prolonging the time necessarily to be spent under the target vehicle was foreseeable. Each journey to the car increased the risk of discovery and assault. In such circumstances it is clear that the duty of care owed to the Claimant included a duty to reduce the time of exposure under the target vehicle by having a system of ensuring that batteries were reliable. The Claimant relies upon the maxim 'res ipsa loquitur' Whether that maxim strictly applies or not, it behoves the Defendant to show that he has done all he reasonably could have done in and about the provision of reliable batteries. In the absence of any evidence on that score it is right to infer that the Defendant is in breach of duty in that respect."

As to whether the Chief Constable was in breach of that duty – that is, "culpable" in exposing Mr Donachie to risk on the occasion in question, the Judge found, in paragraph 69 of his judgment, that he was not in respect of the first of the nine trips to the car, possibly not in respect of the second, to retrieve the device, or the third to attach it for a second time, still with the same battery - presumably because it had been working shortly before this operation began and would have passed any system of testing. However, he found that the remaining six trips were "culpable".

The Judge held that causation was established. In paragraphs 62 to 71 of his judgment, he found that Mr Donachie had suffered extreme stress as a result of repeated trips to the car to attach the device, and that such stress caused or materially contributed to the later stroke. In paragraphs 70 and 71 he referred to medical evidence, which he accepted, that the greater the stress the greater the risk of Mr Donachie having a stroke, and that, *but for* the malfunction, there might have been a small risk but it was considerably greater if the stress was a lot greater. He continued:

"70. ... I agree almost as a matter of common-sense that the greater the number of trips the greater the stress. It is therefore easy to conclude that the excess exposure to stress caused or made a material contribution to the subsequent cerebrovascular accident. If that approach be wrong the Claimant contends that all he has to show is that the additional significant exposure to stress was caused by the culpability of the Defendant. If he does so then he relies upon *McGhee v. The National Coal Board* (1973) 1 WLR 1. That case was discussed and analysed in *Fairchild v. Glenhaven Funeral Services Ltd.* ... by Lord Bingham at ... paragraphs 17-21. See also Lord Hoffmann at ... paragraph 64.

71. In short the "culpable" trips to the motorcar materially increased the risk of stroke occurring and therefore although the Claimant cannot show that but for the culpable trips he would not have suffered the stroke he nonetheless succeeds on

establishing causation. That must be right. It follows that if my conclusions as to foreseeability of harm are wrong then causation is established.”

As I read those paragraphs, the Judge, contrary to the views of Lords Reid, Simon and Salmon in *McGhee* regarded the notion of “material contribution” and that of “material increase in risk” as different and alternative tests. In the light of the analyses of some of their Lordships in *McGhee* and *Fairchild*, I have some sympathy with his approach. But, in any event, despite the indicative, as distinct from conditional, manner in which he referred to the “but for” test in paragraph 71, it is plain that, for the purpose of considering the alternative of “material increase in risk”, he was there referring to his preferred conclusion in paragraph 70, namely the “but for” test. It should be noted that he began the second sentence of paragraph 70 with the finding “... *but for* the malfunction there might have been a small risk but it was undoubtedly considerably greater” (my emphasis), given, as he had found, that “the stress was a lot greater”. And, as can be seen, he went on in that paragraph to find that the excess exposure to stress “caused or made a material contribution” to the subsequent stroke, a finding clearly based on the conclusion on the evidence in paragraph 66 of his judgment:

“I conclude as a matter of fact having heard all the evidence that the stress suffered by the Claimant can be categorised as extreme or severe or even perhaps acute. As said the cardiologists’ view is that in those circumstances the stress of the occasion *caused or materially contributed to* the subsequent cerebro-vascular accident. I have no difficulty in accepting their opinion.” [my emphasis]

Thus, the Judge, who had clearly put his mind to the different tests of causation indicated in the authorities, dealt with it on the *Bonnington* basis. That is, he applied the “but for” test recently reaffirmed as the norm for claims for personal injury in negligence claims by the House of Lords in *Fairchild*. He only turned, in the latter part of paragraph 70 and in paragraph 71, to the material increase in risk test as an alternative. Whether or not, in the light of the equation of the majority of their Lordships in *McGhee* of the notions of “material contribution” and “material increase in risk”, he was wrong to treat them as different tests, his clear finding in paragraph 70 was that the excess exposure to stress “caused or made a material contribution to” the subsequent stroke.

It follows that the Judge applied the general “but for” rule, not some *Fairchild* relaxation of it, as suggested by Mr Edis. In my view, the Judge was correct in the circumstances to apply the general rule.

As to the facts, Mr Edis criticised the Judge’s findings that six of the nine trips to the car were “culpable”. He relied on the fact that, on the evidence accepted by the Judge, it was not until the fifth trip, that is, after the first battery had failed for the second time, that Mr Donachie tried another battery. So, he argued, the Chief Constable’s culpability did not begin until the sixth trip when Mr Donachie had to retrieve the device from the car for the third time. It followed, he said that about half the total stress to which Mr Donachie was exposed was not “culpable”, a consideration relevant to causation as well as foreseeability, since Mr Donachie had to prove that the extra stress was a material contribution to his subsequent stroke. To do that, Mr

Edis submitted, he had to prove that he would not have suffered his injury but for those “culpable” trips to the car.

Mr Edis, in addition to what he maintained was “substantial non-culpable stress” on the day in question, pointed to earlier features of Mr Donachie’s mental state, including: evidence that the Judge accepted of his change of mood in the previous six weeks and Mr Donachie’s own attribution of his condition to a sudden recall from holiday, his normal workload and a meeting with an informer two days later. No culpability on the part of the Chief Constable had been established in respect of such matters, but, said Mr Edis, they were relevant to the issue of causation. He maintained that in a case such as this, a single wholly exceptional event and with such contributory factors, the “but for” test remains the general rule in tort, as acknowledged their Lordships in *Fairchild*.

Mr Turner accepted that Mr Donachie’s first trip to the car would have been necessary to attach the device even if it had been in proper working order. However, he maintained that all of the following eight trips were caused by the Chief Constable’s breach of duty, given the evidence, accepted by the Judge, that, despite the Force’s two years’ experience of a high failure rate of the batteries and the risk that such failure created for officers using them, it had done nothing about it, by investigation, instruction or warning or otherwise.

As to the correctness of the test of causation adopted by the Judge, Mr Turner relied on the fact that the Judge had found, on the evidence before him, not only that stress for which the Chief Constable was culpably responsible had increased the risk of Mr Donachie suffering from a clinical psychiatric condition and stroke, but that such stress had caused, in the sense of materially contributed to, both those conditions. Accordingly, he submitted, Mr Donachie succeeded before the Judge on that basic *Bonnington* test of “material contribution” to the injury without need for recourse to the “material increase in risk” alternative derived from *McGhee* and *Fairchild*.

The only question is whether the Judge, in his application of the *McGhee* test, could properly find on the evidence before him that the Chief Constable had caused or materially contributed to Mr Donachie’s injuries, given the various factors contributing or capable of contributing to his extreme stress at the material time and to the impossibility for him of proving their relative contributions.

I do not see on what basis the Court could properly interfere with the Judge’s finding in paragraph 70 that the excess culpable exposure by the Chief Constable of Mr Donachie to extreme stress in the circumstances that he found proved, “caused or made a material contribution” to his stroke. As Mr Edis acknowledged in argument, this is primarily a factual matter on which the Judge has made clear findings of primary fact.

Accordingly, I would allow Mr Donachie’s appeal on the issue of reasonable foreseeability and, to the extent if at all it is a separate consideration, the issue of pre-existing vulnerability, and dismiss the Chief Constable’s cross-appeal on the issue of causation.

**Latham LJ:**

I agree.

**Arden LJ:**

I also agree.