

Psychiatric damage: Primary and Secondary Victims

Rob Sowersby

Psychiatric injury is psychiatric injury

- C must prove s/he has suffered a **recognised psychiatric injury** (*ie*, a diagnosable condition)
- It is **not** adequate if they only prove fear, upset, distress, horror, anxiety or grief

What's the good news?

- *Alcock* [1992] 1 AC 310 (House of Lords)
- *Walters* [2002] EWCA Civ 1792 (CA)
- *Taylor* [2013] EWCA Civ 194 (CA)

Alcock 1: primary and secondary victims

Alcock divided victims of psychiatric injury into two categories:

- Primary
- Secondary

Primary victim: Type I

Usually a primary victim is a person who could reasonably foreseeably suffer physical injury as a result of the defendant's actions

Is harm reasonably foreseeable?



Primary victim: Type II

- Genuine (but mistaken) fear of personal harm
- Reasonable (but wrong) fear of personal harm
- Circumstances that could cause psychiatric injury even in someone of 'reasonable fortitude'

Primary victim:

REMEMBER:

A person does not have to actually suffer physical injury to qualify as a primary victim

Effect in clinical negligence cases

In the vast majority of clinical negligence cases:

- the patient will qualify as a primary victim
- nobody else will

Secondary victims: a *bit* more complicated...

“A passive and unwilling witness of injury caused to others” Lord Oliver (*Alcock*)

Secondary victims: “control mechanisms”

- (1) The psychiatric injury arose from witnessing the injury or death of, or extreme danger or discomfort to, the primary victim
- (2) The injury arose from sudden and unexpected shock
- (3) There were close ties of love and affection between the primary and secondary victims
- (4) The claimant was present at the scene of the event or witnessed the aftermath a short time later
- (5) Injury of that type to that claimant was reasonably foreseeable

1. Death, injury or danger

The psychiatric injury arose from witnessing the injury or death of, or extreme danger or discomfort to, the primary victim

2. Shock

C must prove that the psychiatric illness was caused **by the sudden and direct appreciation by sight or sound of a horrifying event or events**, *rather than from stress, strain, grief or sorrow, or from a gradual or retrospective realisation of events* (which would not found a claim)

3. Close ties of love and affection

These will be presumed in the context of some relationships (parent-child; husband-wife), but normally C has to provide evidence (usually in witness statement/s) to *prove* this

4. At the scene / aftermath (Slide I)

Patients' relatives are not always present at the actual occurrence of any clinical negligence

What is meant by 'the event', by 'the aftermath'?

4. At the scene / aftermath (Slide II)

There is no single answer to the question of what is the event, or how long is the aftermath?

These are questions of fact and degree

4. At the scene / aftermath (Slide III)

- Clinical negligence causes injury to C's infant son
- C is initially told brain damage unlikely
- Son suffers convulsions
- C is told severe brain damage *has* occurred
- Son's life support is withdrawn and he dies
- C suffers psychiatric injury

4. At the scene / aftermath (Slide IV)

For secondary victims the “event” in question was a convenient description for the series of events which made up the entire event, beginning with the negligent infliction of damage and running to the conclusion of the immediate aftermath... this was a seamless tale lasting 36 hours which, for the mother, was one drawn out experience

5. Foreseeability of psychiatric injury

If all of the other control mechanisms have been satisfied, then this one almost inevitably will be

A recent development

Taylor v A. Novo Ltd [2013] EWCA Civ 194

- C's mother was injured in an accident at work
- D admitted negligence
- 3 weeks later C's mother developed a PE and died suddenly
- The shock of witnessing the death caused C to suffer psychiatric injury
- Claim fails

Summary – stage I

- Recognised psychiatric condition + claimant within range of foreseeable physical harm
= Primary victim (can recover)
- Recognised psychiatric condition + claimant outside range of physical harm themselves
= Secondary victim (can recovery only if ‘control mechanisms’ are all satisfied)...

Summary – stage II

...

- In secondary victim cases, even where all of the control mechanisms appear to be satisfied, consider whether there may be a *Taylor* defence?
- Are the experts clear as to the impact of the negligence and its immediate consequences vs. the impact of the eventual outcome?

Example 1

- D's car drives safely past C
- 100 yards on it drifts onto the pavement, hitting a woman and squashing her pram
- It is a horrible and shocking event: there is blood everywhere
- C sees everything and develops a deep clinical depression
- Can C recover damages for her depression from D?

Example 2

- D's car drives up onto the pavement and past C, missing her by just inches
- C develops an Anxiety Disorder and finds it hard to walk near traffic, which makes her walk to work impossible
- Can C recover damages from D to compensate her for her psychiatric injury and any associated losses?

Example 3

- D's car drives safely past C
- 100 yards on it drifts onto the pavement and squashes & kills C's twin sister
- It is a horrible and shocking event: there is blood everywhere
- C sees everything. She is hugely distressed, and experiences terrible grief
- Can C recover damages from D?

Example 4

- Husband's heart condition treated negligently by doctor
- Husband has heart attack at work
- C (wife) attends hospital
- C is told husband is dead but won't believe it
- C sees husband's body lying peacefully
- Outcome ?

Example 5

- C's son is injured in car accident
- Son deteriorates due to poor medical treatment over 2-week period
- C spends that period attending bedside
- Son dies
- C develops psychiatric injury
- Outcome?

Key points to prove/disprove: “non-patient” clinical cases

- That C has a diagnosed psychiatric condition
- That sudden shock - from being present at a horrifying event or its aftermath - either caused that condition, or at least made a more than minimal contribution to C developing it
- That the event/aftermath involved injury to or the death of a loved one (ref. close ties *etc*)
- The way in which the horrifying event was unusual / out of the ordinary
- Establish clearly what you say constituted the event / its aftermath