Secondary victim claims – are things any clearer?

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A potted history

To give you a picture of how long it has taken us to reach the point we are at now within the 'secondary victim' jurisprudence, it should be noted that the first 'nervous shock' claims were being brought (albeit also being rejected) as early as the mid 19th Century (see *Lynch v Knight (1861) 9 HL Cas 577*).

Although initially unsuccessful, such claims were being brought successfully at the turn of the 20th Century (see *Dulieu v White and Sons [1901] 2 K.B. 669*), but with the proviso that the fear of injury had to be to the person themselves.

That restriction was then scrapped some 24 years later in *Hambrook v Stokes Bros [1925] 1 KB 141* where a mother's shock arose from sight of the event itself, and from fear for her children's safety.

The restrictions were then broadened further in *Boardman v Sanderson [1964] 1 WLR 1317,* where it was held that it was enough to establish injury suffered in the 'immediate aftermath' of an accident (a principle confirmed six years later in *Hinz v Berry [1970] 2 QB 40*).

The modern beginnings of the control mechanisms

McLoughlin v O'Brien [1983] 1 A.C. 410

The claimant's husband and children had been involved in a road traffic accident. One child was killed, and the husband and two other children were left severely injured. The claimant did not witness the accident directly, but it was reported to her whilst at home some 2 hours later. At the hospital she saw the extent of the injuries and heard of the death of her daughter, as a result of which she suffered severe and persisting nervous shock.

The case went to the House of Lords. Lord Wilberforce summarised the jurisprudence up until that point as follows (at 418):

1. A claim for nervous shock (rather than 'grief or sorrow') could be made without showing direct impact or fear of immediate personal injuries for oneself.

2. Such a claim could be brought on by injury caused to a near relative, or by the fear of such injury. (N.B. - the cases by this point did not extend beyond the spouse or children of the plaintiff).

3. A claimant was not able to recover damages where the injury to the near relative occurred out of sight and earshot of the plaintiff, unless they had come upon its 'immediate aftermath'.

4. Whilst bystanders who came upon a serious accident involving numerous people could not recover, a rescuer could.

In this instance, the courts would proceed in the, *'the traditional manner of the common law from case to case upon a basis of logical necessity.'*

As such, they allowed the claim out of that logical necessity, although it was;

'upon the margin of what the process of logical progression would allow…If one continues to follow the process of logical progression, it is hard to see why the present plaintiff also should not succeed. She was not present at the accident, but she came very soon after upon its aftermath. If, from a distance of some 100 yards (cf. Benson v. Lee), she had found her family by the roadside, she would have come within principle 4 above. Can it make any difference that she comes upon them in an ambulance or, as here, in a nearby hospital, when, as the evidence shows, they were in the same condition, covered with oil and mud, and distraught with pain? If Mr. Chadwick can recover when, acting in accordance with normal and irresistible human instinct, and indeed moral compulsion, he goes to the scene of an accident, may not a mother recover if, acting under the same motives, she goes to where her family can be found?'

However, the Court was quick to caution against any sudden extension of the above principles for policy reasons, namely:

1. The fear of a proliferation of claims (possibly fraudulent) along with the establishment of an industry of lawyers and psychiatrists who will formulate claims.

2. An extension would be unfair to defendants as it would impose damages out of proportion to the negligent conduct complained of.

3. An extension beyond the most obvious cases would greatly increase the evidential difficulties and lengthen litigation.

4. Such a radical extension ought only be made by the legislature.

Whilst some of the above would of course be overstated, they nevertheless rang true enough. The fourth concern is one that has been echoed repeatedly in other cases since (see e.g. *White v Chief Constable for Police [1998] 3 W.L.R. 1509*).

With that in mind, restrictions were necessary. The restrictions were not dreamt up out of nowhere but distilled from the case law thus far. What one had to establish in order to recover damages was that:

1. The injury was the injury reasonably foreseeable (i.e. would a person of 'customary phlegm' or 'normal fortitude' suffer psychiatric injury)

2. A close (most likely family) tie.

3. Proximity both in time and space (which would include the immediate aftermath)

4. Shock through sight or hearing of the event or of its immediate aftermath.

The gateway criteria confirmed

Alcock and ors v Chief Constable of South Yorkshire Police [1992] 1 A.C. 310

As is well known, the case of *Alcock* involved claims by those who witnessed the death of their loved ones in the Hillsborough disaster of 1989.

After a long examination of the case law by several of their Lordships, the three control mechanisms (on top of reasonable foreseeability) were confirmed albeit refined. They have stood the test of time ever since. What is required in order to establish a secondary victim claim is:

1. Reasonable foreseeability.

2. A close tie of love and affection to the immediate victim

3. Closeness in time and space to the incident or its immediate aftermath

4. The 'nervous shock' must have come through the Claimant's own unaided senses. I.e. as a consequence of the sudden appreciation by sight or sound of a horrifying event.

We shall examine each in turn.

A close tie of love and affection to the immediate victim

This may be present in family relationships or those of close friendship. Although it would be a matter to prove for the claimant, the connection is presumed in the case of a spouse, parent or child.

If the claimant is not one of those things, then the relationship had to be at least comparable in terms of the care received/given.

An example would be *McCarthy v Chief Constable of South Yorkshire (17 December 1996, unreported)* where damages were awarded to a claimant who was a half-brother to the primary victim. Although they lived in separate accommodation this was of no significance as it was not unusual for families in Liverpool to send children to live with grandparents when the house was overcrowded.

Closeness in time and space to the event or its immediate aftermath

For practical purposes, this gateway should in fact be broken down further:

1. What is an 'event'?

2. Did the Claimant come upon the immediate aftermath?

3. (Is it perceived by the Claimant suddenly enough?)

4. (Is it shocking/horrifying enough?)

What is an event?

What has caused probably the most head scratching amongst PI lawyers is what constitutes the 'event' for the purposes of a secondary victim claim. We seemingly have (at last) clarification in *Paul v Royal Wolverhampton NHS Trust [2020] EWHC 1415 (QB)* but we should trawl through the case law that got us there in the first place so that we can understand the decision.

Taylor v Somerset HA [1993] 3 Med LR

The claimant's husband suffered a heart attack at work which was a result of a failure by the defendant many months earlier to diagnose his serious heart disease.

He died at work at circa 15:00. The claimant was informed that her husband had become ill not dead) and was at the hospital within 20 minutes. 20 minutes after that she was informed that he had died. Not believing it, she identified him within the mortuary a few minutes later.

The claim was rejected on the basis that she had not directly perceived the immediate aftermath of the event. The 'event' needed to be:

'(i) an external, traumatic, event caused by the defendant's breach of duty which immediately causes some person injury or death; and

(ii) perception by the plaintiff of the event as it happens, normally by his presence at the scene, or exposure to the scene and/or to the primary victim so shortly afterwards that the shock of the event as well as of its consequences brought home to him.'

Mr. Justice Auld held;

'There was no such event here other than the final consequence of Mr Taylor's ***progressively deteriorating heart condition*** *which the health authority, by its negligence many months before, had failed to arrest. In my judgment, his death at work and the subsequent transference of his body to the hospital where Mrs Taylor was informed of what had happened and where she saw the body do not constitute such an event.'*

(N.B. – the claim would have been dismissed in any event as the communication of death would not qualify. The law did not compensate for communication of the fact of death by a third party, see *McLoughlin*).

North Glamorgan NHS Trust v Walters [2002] EWCA Civ 1792

The defendant had failed to diagnose a child's hepatitis. His mother sought damages for the psychiatric illness sustained as a consequence (the child having suffered a fit and dying within the Mother's arms within 36 hours). The claim was allowed.

One had to look at 'the totality of circumstances' which brought the claimant into proximity in both time and space to the accident. The event was **not a single moment frozen in time** (see para 23). In this case there was:

'***an inexorable progression*** *from the moment when the fit occurred as a result of the failure of the hospital properly to diagnose and then to treat the baby, the fit causing the brain damage which shortly thereafter made termination of this child's life inevitable and the dreadful climax when the child died in her arms. It is a* ***seamless tale*** *with an obvious beginning and an equally obvious end. It was played out over a period of 36 hours, which for her both at the time and it subsequently recollected it was undoubtedly* ***one drawn-out experience****.'*

Taylor v Novo (UK) Ltd [2013] EWCA Civ 194

The claimant's mother was injured as a result of a workplace accident. She was recovering well when three weeks later she unexpectedly collapsed and died (the cause being DVT then a PE). The Claimant witnessed her mother's death and suffered PTSD. The claim was rejected.

The defendant's negligence had two consequences separated by three weeks in time. There had not been a "single accident or event". The falling of the racking boards on to the claimant's mother was one event, the death was another. If the daughter had witnessed the accident and suffered psychiatric illness as a result of that, she may have recovered. She could not, however, recover for injury caused by the death some three weeks later.

If the claim succeeded, it was said that claimants could claim for illness occurring months, and possibly years after the accident. This would suggest that proximity could not stretch that far. If the mother died immediately and the claimant arrived shortly after the accident the claimant would not (albeit only just) satisfy the requirement of physical proximity and the claim would fail. It would not make sense therefore if she could not claim in that situation but could claim in this one.

Secondly, the extension of liability contended for was too far and too substantial for policy reasons (see Lord Steyn's Judgment in *White*).

The important point was that the death was not the 'event' for the purposes of deciding proximity.

Walters was distinguished on the basis that that event was a *'seamless tale with an obvious beginning and an obvious end'.* In this case there were two distinct events.

Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588

The claimant's wife underwent a negligent hysterectomy. After being discharged she became unwell after a few days. She deteriorated rapidly over around 24 hours. The claimant suffered a psychiatric injury from the shock of seeing his seriously ill wife in hospital and suffering from septicaemia and peritonitis as a result of a negligently performed hysterectomy. The claim was rejected.

Again, and unlike *Walters*, this was not a 'seamless tale'. There was no 'inexorable progression' but a series of events and there was nothing like 'an assault upon the senses' as described in *Walters.* It is noted however that there was no challenge to the first instance judge's finding that an 'event' was the point where the negligence became actionable.

Clarification at last? Paul v Royal Wolverhampton NHS Trust – [2020] EWHC 1415 (QB)

In *Paul* the claimants were out walking with their father. He mentioned he felt ill. They saw him lean against a wall, his eyes roll back, fall backwards and hit his head on the floor. Attempts were made to call 999 and shout for help nearby. Both claimants saw a man holding their father's head and his hands being covered in blood. They were ushered into a nearby church. Their mother arrived on the scene shortly thereafter. They heard her outside screaming and went to join her whereupon they saw the ambulance crew had put a foil on their father and were doing compressions. He died some 20 minutes or so later in hospital.

The allegation was that the failure to diagnose the Claimants heart condition in 2012 was negligent, and that if they had performed an angiography at the time then coronary artery disease would have been diagnosed, treated and prevented the father's death.

The claims were struck out but reinstated on appeal to Mr. Justice Chamberlain.

Judgment

The key question was what would count as 'an event'?

In relation to the issue of how to define an 'event' D's submissions were that the event:

1. Had to be synchronous or approximately synchronous with the negligence (this was effectively abandoned on appeal).

2. It had to involve a positive act rather than omission (again – abandoned on appeal).

3. The event had to be external to the primary victim.

Those submissions were rejected.

1. There was nothing in the authorities to suggest that the 'event' had to be synchronous, or approximately synchronous with the negligence that gives rise to it.

2. Secondly, it could not be argued that there was any merit to the distinction between positive acts and omissions (see e.g. Walters).

3. Thirdly, as to the submission regarding 'external' events, if that were true then it would be impossible for a claimant to recover damages from omissions in (for example) clinical negligence settings here the injury was internal. However, *Walters* was such a case and therefore the proposition could not be true.

   Reference to '*an external, traumatic, event caused by the defendant's breach of duty, which immediately causes some person injury or death'* (in *Somerset*) was reference to injury external to the secondary victim.

   What about *Taylor v A Novo?* That was a case where the event was internal, and the claim was still dismissed. However, that claim was distinguished on the basis that that case concerned the defendant's negligence giving rise to an event which injures a primary victim, a secondary victim can claim only where the injury to them is caused by witnessing *that* event rather than any discrete event that Is a consequence of that event.

The definition of an event that was arrived upon was the point at which the tort becomes actionable (i.e. caused damage).

What is damage is a matter of fact, and it will be a matter of argument as to when it occurred. That said, Mr. Justice Chamberlain was of the view there are no further events after the damage first became manifest (i.e. that is the end of the line).

Did the Claimant witness the immediate aftermath?

This can be dealt with shortly. We know that the event is when the damage occurs, or at least becomes manifest. In *Paul* the obvious answer was yes – the claimants were there during the event.

What will qualify as the immediate aftermath is not a matter of precision. But (much like general damages) I would respectfully suggest you can get some guidance by comparing the following cases:[1]

Alcock – The claimants witnessed the bodies and suffered injury 8 or 9 hours after the accident. Claim rejected.

McLoughlin – 2 hours after being informed that the claimant's husband and children were in an accident. Claim allowed.

Taylor v A Novo – 3 weeks after the damage. Claim rejected.

Gail-Atkinson v Seghal [2003] EWCA Civ 697 – Death of daughter in RTA at circa 7:05. The claimant arrived at the police cordon at or around 08:15, whereupon she was informed of her daughter's death (although her daughter by this stage was in the mortuary).

She broke down there and then. She was at the mortuary at or around 09:15 where she identified the body of her daughter which was disfigured. It was held that the immediate aftermath stretched from the moment of the accident until the identification in the mortuary.

[1] I acknowledge that there may be many more cases that would shed light on this area. For the sake of concision, I have simply focussed on the cases decided at appellate level.

Was the event: a) sudden, and b) shocking?

The event in question must be horrifying enough to *'violently agitate the mind*', and/or is a *'sudden assault on the nervous system'* (see *Alcock)*. The bar is high. It is an objective standard judged by reference to persons of ordinary susceptibility and has to be something that *'is exceptional in nature'* (para 41 of *Shorter*).

As to the suddenness of the event, again the following cases are a useful guide:

Taylorson v Shieldness Produce Ltd [1994] PIQR P329 – The claimant's son was crushed by a reversing vehicle and taken to hospital. The claimant was told of the accident soon after the accident occurred, drove to hospital and then followed an ambulance which transferred the son to a second hospital. The parents caught brief glimpses of their child upon transfer from the ambulance to ICU. They stayed with him for three days and until his life support machine was switched off.

The claim was rejected because the illnesses suffered couldn't be attributed to one *shocking event* but a *sequence* of events over time.

Sion v Hampstead HA [1994] 5 Med LR 170 – The claimant suffered a psychiatric illness as a result of a hospital failing to care for his 23-year-old son after he was in an RTA. The claimant stayed at his son's bedside for 14 days and until he died.

The claim rejected as there was no *single shocking* event.

Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588

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The claim was rejected. Unlike *Walters*, this was not a 'seamless tale'. There was no *'inexorable progression'* but a series of events, and there was nothing like *'an assault upon the senses'* as described in *Walters.*

Means of perception

TV

Usually, seeing the images on TV is not enough. In *Alcock* watching the events unfold on TV would not demonstrate the requisite degree of proximity for two reasons:

1. None of the scenes depicted the suffering of recognisable individuals.

2. The trauma arose not from seeing the pictures but from the knowledge that a loved one had died.

That said, simultaneous broadcasts were not ruled out as being equivalent to actual sight and hearing of the event or its immediate aftermath in every case. Lord Ackner cited the example given by Nolan LJ in the Court of Appeal of the televising of a special event in which children were travelling in a hot air balloon when it suddenly burst into flames. The impact of such simultaneous television pictures might, he thought, be as great, if not greater than, actual sight of the accident.

Communication from a third party

In short – this does not qualify. See both *McLoughlin* and *Alcock.*

Negligent communication

What about negligently communicating distressing news?

In *AB v Tameside and Glossop Health* the claimants mounted a group action as a result of all being told by letter that they had received obstetric treatment from HIV positive health workers. It was averred that they should have been informed in person by their GP. It was averred that the defendant owed a duty of care to break distressing news in such a way so as to minimise the risk of developing a psychiatric illness. However, that does not mean that such a duty established in other cases, since in that case a duty was admitted. Whether such a duty exists is therefore still open to challenge.

Re-cap

In short, for a secondary victim claim to be established the following are required:

1. That psychiatric harm was reasonably foreseeable to a person of ordinary phlegm and fortitude, as a result of the breach of duty.

2. A close tie of love and affection between the PV and SV.

3. The identification of the event where the tort to the PV became actionable (i.e. caused damage).

4. That the SV was either present, or at least within that event's immediate aftermath.

5. That the identified event was 'sudden' and 'shocking' enough.

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