

Secondary victim claims – are things any clearer?

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Housekeeping

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The talk

- A brief bit of history.
- Exploring the gateway criteria.
- Analysis of *Paul v Royal Wolverhampton NHS Trust* [2020] EWHC 1415 (QB).
- Q and A?
- Will not cover every case!

A potted history

- Nervous shock claims being brought in the mid 19th Century (see *Lynch v Knight (1861) 9 HL Cas 577*).
- Successfully so by the turn of the century (*Dulieu v White and Sons [1901] 2 K.B. 669*)
- A loosening of restrictions in *Hambrook v Stokes Bros [1925] 1 KB 141* and later in *Boardman v Sanderson [1964] 1 WLR 1317*.

A potted history – modern beginnings

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

Up until McLoughlin

- 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.
- 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).

Up until McLoughlin

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

McLoughlin - Judgment

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

McLoughlin – words of caution

- Would there be a proliferation of claims (possibly fraudulent) along with the establishment of an industry of lawyers and psychiatrists who will formulate such claims?
- An extension would be unfair to defendants as it would impose damages out of proportion to the negligent conduct complained of.

McLoughlin – words of caution

- An extension beyond the most obvious cases would greatly increase evidential difficulties and lengthen litigation.
- Such a radical extension ought only be made by the legislature.

McLoughlin– the control mechanisms

The mechanisms as stated in *McLoughlin*:

- Was the injury reasonably foreseeable (i.e. would a person of ‘customary phlegm’ or ‘normal fortitude’ suffer psychiatric injury).
- A close (most likely family) tie.

McLoughlin– the control mechanisms

- Proximity both in time and space (which would include the immediate aftermath).
- Shock through sight or hearing of the event or of its immediate aftermath.

The Alcock control mechanisms

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

The Alcock control mechanisms

- Reasonable foreseeability.
- A close tie of love and affection to the immediate victim.
- Closeness in time and space to the event or its immediate aftermath.

The Alcock control mechanisms

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.'

Close tie of love and affection

- Is a matter of proof for the claimant.
- Presumed in the case of spouse, parent or child (and possibly fiancée).
- Must be at least comparable in terms of the care received/given.
- See *McCarthy v Chief Constable of South Yorkshire* (17 December 1996, unreported)

Proximity to the event or its immediate aftermath

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

- What is an ‘event’?
- Did the Claimant come upon the immediate aftermath?
- (Is it perceived by the Claimant suddenly enough?)
- (Is it shocking/horrifying enough?)

What is an event?

Taylor v Somerset HA [1993] 3 Med LR

What is an event?

- (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.'*

What is an event?

*‘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.’*

What is an event?

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

- It is not a single moment frozen in time.
- In this instance there was ‘*an inexorable progression*’, a ‘*seamless tale*’, a ‘*drawn out experience*’

What is an event?

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

- Two separate events.
- The death was not the event.
- Contrast with arriving at the scene.
- Policy reasons.

What is an event?

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

- Not a 'seamless tale'.
- A series of events.
- Accepted that it was the point at which the negligence became actionable.

What is an event?

Paul v Royal Wolverhampton NHS Trust – [2020] EWHC 1415 (QB)

D:

1. Had to be synchronous or approximately synchronous with the negligence.
2. It had to involve a positive act rather than omission.
3. The event had to be external to the primary victim.

What is an event?

- 1 and 2 abandoned.
- 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.

The event – a definition?

- The event that will qualify is 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.
- There are no further events after the damage first became manifest.

The immediate aftermath

- Alcock: 8 or 9 hours after the accident, which was too long.
- McLoughlin: 2 hours after being informed that the claimant's husband and children were in an accident.
- Taylor v A Novo: 3 weeks after the damage.
- Gail-Atkinson v Seghal [2003] EWCA Civ 697: 2 hours?

A shocking event

The event must:

- *'violently agitate the mind'*; or
- *'be a sudden assault on the nervous system'*; or be
- *'Exceptional in nature'* (see Shorter v Surrey and Sussex Healthcare Trust [2015] EWHC 614 (QB)).

An objective standard.

A sudden event

- *Taylorson v Shieldness Produce Ltd [1994] PIQR P329* – 3 days by son's bedside
- *Sion v Hampstead HA [1994] 5 Med LR 170* – 14 days by son's bedside
- *Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588* – gradual illness

The means of perception - TV

- Not enough in Alcock.
- No recognisable individuals.
- The trauma arose not from seeing the pictures but being but the knowledge that a loved one had died.
- Simultaneous broadcasts?

The means of perception – third parties

- Not enough (see McLoughlin and Alcock).
- Negligently communicating distressing news?
- *AB v Tameside and Glossop HA [1997] P.N.L.R 140.*

Recap

1. Is psychiatric harm reasonably foreseeable as a result of the breach of duty?
2. Is there a close tie of love and affection between the PV and SV?

Recap

3. What was the event where the tort to the PV became actionable?
4. Was the SV either present, or at least within *that* event's immediate aftermath?
5. Was the event 'sudden' and 'shocking' enough?