

NEW DEVELOPMENTS IN SECONDARY VICTIM CASES: PROXIMITY AND SUDDEN SHOCK

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SECONDARY VICTIM CASES: THE PRACTITIONER'S DILEMMA

- What is the Problem?
- Common Sense not a Reliable Guide
- Real Life: A Few Examples
- Another Example: The Facts of Taylor v Novo

SUMMARY OF THE REQUIREMENTS FOR A SECONDARY VICTIM CLAIM

1. Psychiatric illness
2. Caused as a result of directly witnessing
 - threat or injury to a loved one
 - or its immediate aftermath
3. Due to the sudden shock of witnessing that event.

Particular focus for today –

- What is meant by Sudden Shock?
- The relevance of the Hospital Context

THE HOSPITAL CONTEXT

Likely Features of Hospital Cases

1. Day to day work of hospitals: people who are injured or ill - or vulnerable if healthy - go there, followed by their loved ones.
2. The nature of any triggering event (whether due to illness and/or injury in hospital) may well be of a different quality
 - The event itself may not be perceived at all;
 - in any case less likely to be sudden: more likely to be gradual in onset
3. In the nature of hospital visits that you can expect bad news;
 - may be deeply distressing or upsetting, but
 - less likely to be a “sudden assault on the nervous system”

OVERVIEW OF 2V CASES: THE LAW

Secondary Victim Cases – in the Context of Tort Cases Generally

The Need for Control Mechanisms in Secondary Victim Cases

- (a) The relationship between 2V and PV (close ties of love and affection)
- (b) 2V's experience of the threat or injury to PV
 - Physical proximity to incident in time and in space (i.e. directly perceived it or its immediate aftermath).
- (c) The Shocking Nature of the Event
 - that the event be sufficiently sudden and shocking that it did in fact cause psychiatric injury through the medium of shock / because of its sudden and shocking nature.

WHY ARE CONTROL MECHANISMS NEEDED IN SECONDARY VICTIM CASES?

Number of Possible Tort Systems (in order of increasing difficulty for C)

1. *No Fault Liability (not strictly tort)*
2. *Causation Only Required*
3. *Causation & General Foreseeability only*
4. *Causation, Foreseeability and Proximity*
(and if so – what is meant by proximity in this context?)

SO – our system is positioned between those last two

- Causation, foreseeability and proximity required
- Proximity requirement is still “Who is my neighbour”
- But that means that there is still the question: what does Proximity mean in a SV case?

Thus: 2V Jurisdiction is an extension to the normal proximity rules, so as to allow recovery in extreme cases – while still applying those rules: so the question is – how to deal with legal proximity in these cases?

THE CONTROL MECHANISMS

Lord Oliver's speech in *Alcock* sets these out. Essentially, as well as the normal rules as to Breach, Foreseeability and Causation

1. C must be closely related to PV: “close ties of love and affection”
2. C must either have been present at the incident or its immediate aftermath. Both physical and temporal proximity are required.
3. C must have been perceived the death, risk or injury with his or her own senses. Being told about it by someone else will not do.
4. C must have suffered a recognised psychiatric injury (mere grief or distress are not sufficient)
5. Such injury must be caused by ‘shock’, due to sudden perception.

THE CASES

McLoughlin v. O'Brian [1983] AC 410

HL

Since this was the original “nervous shock” case, it is important to recall its facts, which were extreme. Lord Wilberforce recited them as follows:

“This appeal arises from a very serious and tragic road accident [between two lorries and then a Ford motor car] ... The appellant's husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7 and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael, then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. ... As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of both scapulae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions and shock; Gillian was so seriously injured that she died almost immediately.” [cont. over]”

McLoughlin v O'Brian (cont.)

“At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the condition of her daughter. He then drove her to Addenbrooke's hospital, Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother.

There can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow.”

Alcock v. Chief Constable of S. Yorks Police [1992] 1 AC 310 [HL]

- Hillsborough; claims by victims' families
- Failed – did not satisfy proximity test – not present
- Control Mechanisms recited (Lord Oliver) – see above

White v. Chief Constable of S. Yorks. Police [1999] 2 AC 455 [HL]

(+ *Frost*)

- Hillsborough Police cases
- This time, case brought by the Police
- Again, control mechanisms not satisfied

Taylor v. Somerset Health Authority [1993] PIQR P262 [Auld J]

- Hospital Clinical negligence; PV husband – suffers HA and dies
- Wife suffers psych damage on seeing his body in distressing circs
- No recovery for two reasons
 - because not within aftermath
 - No qualifying event at all – just deterioration

Taylorson v. Shieldness Produce Ltd. [1994] PIQR P329

- Claims by parents of boy very badly injured in car accident
 - Did not see accident
 - Saw him later
 - He died 3 days after that
- No recovery – shock insufficiently direct

Sion v. Hampstead Health Authority [1994] 5 Med LR 170

- Clin Neg
- Slow demise – no sudden event at all apart from accident
- No Shock (Staughton)
- Claim fails

North Glamorgan NHS Trust v Walters [2003] PIQR P16

- This is the one “hospital case” that has succeeded
- Clinical Negligence: failure to diagnose C’s Infant Son
- Thomas J finds for C; D appeals; Claim succeeds:
 - succession of events; Utterly out of the ordinary
 - Principle: if the necessary sudden shock is there, it does not prevent recovery that the events themselves were drawn out over 36 hours

Taylor v Novo [2014] QB 150

- [already mentioned; to be dealt with by NK]

Shorter v Surrey and Sussex Healthcare NHS Trust [2015] EWHC 614 (QB) Swift J

- Clin Neg; failed for insufficient shocking event

Wild v Southend University Hospital NHS Foundation Trust [2015] EWHC 4053.

- Similar

TAYLOR V NOVO

Proximity and Propinquity

TAYLOR V NOVO

HHJ HALBERT'S SEVEN CRITERIA

- Foreseeability
- Relationship
- Injury
- Causation
- Sudden shock
- Proximity
- Perception

TAYLOR V NOVO

JUDGMENT OF HHJ HALBERT (1)

“...taking a commonsense view, this was not a gradual decline leading to death, it was a sudden collapse. It was on any practicable view a new ‘event’ and a traumatic one for [Crystal Taylor]. In reality, to argue that it was not a separate event is an artificial construct.”

TAYLOR V NOVO

JUDGMENT OF HHJ HALBERT (2)

“...it is an attempt to establish a defence based on the ALCOCK ‘control mechanisms’ in a situation where they really do not apply. The operative ‘event’ which traumatised the Claimant was sudden and horrifying. She was present at the scene and witnessed it with her own senses. The fact that there was an earlier incident caused by the same negligent act is irrelevant.”

TAYLOR V NOVO

THE BASIS OF THE APPEAL

Novo appealed the Judge's findings that

- There was a sufficiently proximate relationship between Crystal and Novo to found a cause of action on her behalf; and/or
- There was a sufficient proximity between Crystal and the original accident to found a cause of action on her behalf; and/or
- Novo owed to Crystal any relevant duty of care.

ROBERT BARRY WHITE V LIDL UK GMBH [2005] EWHC 871 (QB)

*“...a potential claimant must establish...
[both] legal proximity and spatial and
temporal propinquity.”*

ALCOCK V CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE [1992] 1 AC 310

“...such persons are not, in contemplation of law, in a relationship of sufficient proximity to or directness with the tortfeasor as to give rise to a duty of care...” (410E)

TAYLOR V NOVO: THE APPELLANT'S SUBMISSION

“..it is incorrect to elevate proximity to a relevant event so as to be the test. It distracts attention from the fact that what is required is proximity between the secondary victim and the tortfeasor. Once it is appreciated that the correct question is whether the parties were in a sufficiently proximate relationship, it becomes clear that the answer must be no.”

This was accepted by the Court of Appeal.

TAYLOR V NOVO: THE APPELLANT'S SUBMISSION (2)

That is because Ms Taylor was not present at the scene of her mother's accident at work or any scene that might sensibly be thought to be part of its immediate aftermath. In short, on any sensible application of Lord Atkin's neighbour principle, Ms Taylor was not Novo's neighbour."

This too was accepted by the Court of Appeal

TAYLOR V NOVO: CA LORD DYSON MR

“In this area of the law, the perception of the ordinary reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so far as possible, reflect what the ordinary reasonable person would regard as acceptable.” [166B]

THE EFFECT OF TAYLOR V NOVO: PROXIMITY IN THE GENERAL CONTEXT

- The principles to be derived are therefore as follows
 - Question is always whether proximity established
 - It was wrong – a distracting shorthand - to characterise the issue in that case (as the judge had done) as which was the relevant event – the collapse of the shelves or the death
 - The question was whether the necessary legal proximity was established between C (the secondary victim) and D.
 - When posed that way, it was clear that C (and her possible presence at her mother’s side when she died suddenly three weeks later) cannot have been within the contemplation of the D as a possible consequence of the tort.
 - Hard to see how “two-event” cases can survive this. But

SUDDEN SHOCK AND PROXIMITY IN THE CLINICAL CONTEXT: THE JUDGMENT IN RONAYNE (1)

- Facts
 - Very nasty situation, from which C luckily recovered
 - Septicaemia and Peritonitis as a result of colon rupture
 - Nasty swelling – blew up like Michelin man
 - C shocked by this
 - As to psychiatric illness, expert evidence as follows
 - C: PTSD
 - D: (a) none; or (b) if anything Adjustment Disorder
- HHJ Allan Gore QC:
- Not PTSD – doesn't want to label but if he had to, PTS
 - Finds for C on basis of frank psychiatric disorder

SUDDEN SHOCK AND PROXIMITY IN THE CLINICAL CONTEXT: THE JUDGMENT IN RONAYNE (2)

Effect of J for C at first instance was significantly to extend 2V recovery, in particular in hospital context.

This was because the claim succeeded

- simply in the context of a psychological reaction (unspecified in terms of diagnosis) to distressing events, and
- absent any sudden and shocking *event* and (in any event)
- absent) any evidential basis for a finding that *C's psychiatric illness was as a result of the sudden shock of that event.*

Therefore D appealed on two distinct grounds:

- (1) event insufficiently shocking, and in any case
- (2) psychiatric injury not caused by shock in required sense

Extracts: Judgment of Tomlinson LJ in Ronayne (1)

[37] “... I do not regard the sight of his wife [in bed in hospital] as the obvious beginning of a distinct event. It is nothing like the “assault upon the senses” to which Mrs Walters awoke, which Ward LJ equiparated with the mother seeing her child bleeding in a seat after a road traffic accident, and compare also the facts in *McLoughlin v O’Brian*. [He] knew from his time at the hospital earlier in the morning that abnormalities had been found, a shadow on his wife’s lower lung and abnormalities in the blood. Before he saw her later in the day he knew that, as a result of a CT scan, a mass had been found in her abdomen which the doctors could not identify. He knew before seeing her that she was to go into theatre for immediate surgery, and he knew that that meant that her condition, whatever it was, was, in his own words, “deadly serious.” In these circumstances I regard it as artificial to regard the sight of his wife in her pre-operative condition as constituting the beginning of an event distinct from what had gone before.

EXTRACTS: JUDGMENT OF TOMLINSON LJ IN RONAYNE (2)

[38] Equally I regard it as wholly artificial to describe the sight of his wife in her post-operative condition as the end of a distinct event. It was all part of a continuum

[40] At each stage in this sequence of events the Claimant was conditioned for what he was about to perceive. Before first seeing his wife connected to drips, monitors etc he knew, of course, that she was in hospital, and that that was because she was not recovering as expected from her operation and was running a high temperature. He knew that abnormalities had been found and that she was to undergo immediate exploratory surgery. There was in these circumstances nothing sudden or unexpected about being ushered in to see her and finding her connected to medical equipment as she was

EXTRACTS: JUDGMENT OF TOMLINSON LJ IN RONAYNE (3)

“[41] Furthermore what the Claimant saw on these two occasions was not in my judgment horrifying by objective standards. Both on the first occasion and on the second the appearance of the Claimant’s wife was as would ordinarily be expected of a person in hospital in the circumstances in which she found herself. What is required in order to found liability is something which is exceptional in nature.

[42] In my judgment therefore the claim fails at the first hurdle.”

LESSONS TO BE LEARNT: A CHECKLIST

- Psychiatric Illness
 - Is there expert evidence that C has suffered a frank psychiatric disorder?
 - If so what is the diagnosis?
- The Triggering Event: Sufficiently Sudden and Shocking?
 - Generally, to what event(s) does the expert ascribe the psychiatric illness
 - In particular, does s/he ascribe it to a particular sudden, unexpected and shocking event?
 - What is the factual evidence as to all of those matters?
- Causation:
 - Was it in fact the sudden, unexpected and shocking nature of events (as opposed to some other response such as extreme grief) that caused the illness?

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