

## Secondary Victim Claims Workshop for AvMA: 11 February 2015

How close is close enough?

Charles Bagot

Hardwicke, London



## Secondary Victim Workshop for AvMA

- ▶ Brief reminder of key issues
- ▶ Workshop looking at scenarios in small groups/ wider group discussion
- ▶ If time permits a look at how the law has developed and is likely to post- the Court of Appeal's decision in *Taylor v Novo* [2014] QB 150; [2013] EWCA Civ194
- ▶ Remainder of slides for reference after workshop
- ▶ No point in hunting on through slides for the answers!

## Distinguishing Primary & Secondary Victims



“Broadly they divide into two categories, that is to say, those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others.”

**Lord Oliver**  
in *Alcock*

[1992] 1 AC 310, at 407D

“the most convenient and appropriate terminology”  
[*Lord Lloyd in Page v Smith* [1996] 1 AC 155, at 184E].

## Primary victims

- ▶ Involved as participants in incident out of which action arises. For duty of care:
- ▶ Only need show PI of any kind, rather than psychiatric injury specifically, was reasonably foreseeable consequence of D's negligence: *Page v. Smith* 197G
- ▶ Must be within range of foreseeable physical injury: *White (Frost) v. C.C. Sth Yorks* [1999] 2 AC 455, at 509C
- ▶ Do not need to satisfy the 'control mechanisms': *Page v. Smith* 197E

## Secondary victims

- ▶ Control mechanisms: policy limiting number of potential claimants
- ▶ Reasonable foreseeability of psychiatric harm (not 'mere grief reaction') from D's negligence; +
  - (i) Close ties of love and affection with primary victim
  - (ii) Proximity to the incident in time and space
  - (iii) Direct perception (not hearing from TP)
  - (iv) Injury from sudden shock (not gradual realisation)

## *Taylor v A.Novo (UK) Ltd* [2014] QB 150 (CA); [2013] EWCA Civ 194

- ▶ Factual background: secondary victim witnessed death of primary victim 21 days after accident at work (but was not present at work accident or its immediate aftermath)
- ▶ Legal proximity issue: normally can be answered by looking at proximity to accident/ event but not where there are later consequences. Key: is a duty owed by Defendant *to 2V*?
- ▶ Issue: Was it sufficient for the 2V to be proximate to the death of the PV (but not the accident or its immediate aftermath)?
- ▶ First instance, answer yes. On appeal, answer no.

## The Workshop: Over to you!

- ▶ Please divide yourselves into small groups to discuss the scenarios in turn to debate your views and make a few bullet point notes.
- ▶ I.D. someone to be spokesperson to report back.
- ▶ Groups will then report back followed by discussion/review of any other conclusions.
- ▶ *This is not a memory test or an attempt to catch people out.* There are not necessarily right/wrong answers.
- ▶ The purpose is to discuss some of the issues which crop up and to debate the boundaries.

## Why the control mechanisms?

- ▶ Complexity of drawing line between acute grief and psychiatric harm
- ▶ Consequence if no/less controls: litigation (by an expanded class of Cs) may be a disincentive to rehabilitation
- ▶ Pure psychiatric harm: a potentially wide class of Cs involved
- ▶ Imposition of liability a burden disproportionate to tortious conduct perhaps involving momentary lapses
- ▶ Lord Steyn in *White (Frost)* at 493G



## Two meanings of 'proximity'

- ▶ Usually where the issue arises in these cases
- ▶ Legal Proximity
  - Neighbour principle
  - Basis of duty of care in tort generally
- ▶ Proximity as a *control mechanism* on secondary victim claims
  - Proximity in time and space to the accident/ tortious event

## Proximity generally

- ▶ Relationship between the parties in any tort case: is there a duty at all?
- ▶ Not the same as reasonable foreseeability
- ▶ ‘Demonstrably too wide’: Lord Atkin in *Donohue*
- ▶ Proximity is a label for the ‘neighbour’ test

*Alcock*: per Lord Keith at 396H:

“So I am of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity between the claimant and the party said to owe the duty. Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562, 580 described those to whom a duty of care is owed as being:

“persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question.”

**The concept of a person being closely and directly affected has been conveniently labelled “proximity”...**

## Proximity in time and space

- ▶ One of the control mechanisms
- ▶ Proximity between C & D furnished, at least in part, by both physical and temporal proximity and also by the sudden and direct visual impression on the C's mind of actually witnessing the event or its immediate aftermath: Lord Oliver in *Alcock* at 416F
- ▶ Proximity to the accident must be: “close in both time and space”:  
Lord Wilberforce in *McLoughlin* [1983] 1 AC 422-3
- ▶ Immediate aftermath: *McLoughlin*: yes; Mortuary visits in *Alcock*: no

## Post-Alcock cases: Flexibility in the aftermath

- ▶ *Taylor v Somerset H.A.* [1993] PIQR P262: mortuary visit, no (and no 'shock')
- ▶ *Taylorson v Shieldness* [1994] PIQR P329: +10 hrs, no (and no 'shock')
- ▶ *Sion v Hampstead* [1994] 5 Med LR 170: drawn out realisation, not shock.
- ▶ *Tredget v Bexley* [1994] 5 Med LR 178: 2 day 'one event' from delivery for 48hrs

## Flexibility in the aftermath

- ▶ *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792:
  - ▶ The event is not a ‘frozen moment in time’
  - ▶ Series of events beginning with negligent infliction of damage to conclusion of immediate aftermath.
  - ▶ Seamless tale with an obvious beginning and end: 36 hour period was ‘one drawn-out experience
- ▶ *Galli-Atkinson v Seghal* [2003] Lloyd’s LR 285:
  - ▶ Event may be made up of a no. of components
  - ▶ Uninterrupted sequence of events until left mortuary (unlike in *Alcock*)
  - ▶ Whole sequence of events led to illness
- ▶ *White v Lidl* [2005] EWHC 871: proximity to subsequent consequence not enough

## Thus far and no further

- ▶ The search for principle was called off in *Alcock*: Lord Hoffmann in *White (Frost)* 511B
- ▶ The law is a patchwork quilt of distinctions that are difficult to justify
- ▶ Leave any expansion or development of the law to Parliament: Lord Steyn in *White* at 500D

## Range of possible tort systems

- ▶ Careless D liable for all consequences, to anyone, of whatever sort, whether foreseeable or not. Causation the only requirement.
- ▶ The same but causation and foreseeability only required, not proximity/duty
- ▶ The same but in addition some element of proximity, but without any distinction between primary and secondary victims
- ▶ No secondary victims: causation, foreseeability and proximity in primary sense only

## *Taylor v A Novo (UK) Ltd* [2014] QB 150 (CA); [2013] EWCA Civ 194

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## *Taylor v Novo* [2014] QB 150 (CA)

- ▶ MR's analysis of law to date on 2V
- ▶ The competing arguments:
  - Judge misunderstood proximity test by focussing on the proximate 'event' not the relationship between the parties
  - Relevant event was the death and 2V was proximate to it (indeed might be PV but for requirement of foreseeable physical injury)

## *Taylor v Novo* [2014] QB 150 (CA)

- ▶ Primary and secondary victim distinction has been criticised, including by the Law Commission, but is well established in law:  
*Alcock/ Frost*
- ▶ Any substantial development should be left to Parliament.
- ▶ Some modest development by the courts may be possible

## Proximity has two distinct meanings



- (1) Legal term of great importance in law of negligence generally: shorthand for 'neighbour' principle
- (2) In secondary victim cases: one of control mechanisms requiring physical proximity in time and space

## *Taylor v Novo* [2014] QB 150 (CA)

- ▶ To allow this claim would 'go too far'
- ▶ Would allow recovery where death months or years later (assuming causation): proximity cannot reasonably be stretched this far.
- ▶ Ordinary person would find it 'unreasonable and unacceptable' for C to recover whereas a 2V who comes upon the scene shortly after the immediate aftermath would not.
- ▶ Policy dictates that 2V cases are limited by strict control mechanisms and policy militates against any further substantial extension by the Courts, rather than Parliament

## *Taylor v Novo* [2014] QB 150 (CA)

- ▶ Reasoning of Auld J in *Taylor v Somerset* was correct
- ▶ Observations of Peter Gibson LJ in *Sion* obiter dicta and not binding
- ▶ Other cases, such as *Walters* were ‘one event’ cases or strike out cases (*W v. Essex*) concerned with other issues such as definition of the aftermath
- ▶ Nothing in the authorities which compels or even supports the Judge’s conclusion
- ▶ CA refused permission to appeal to the SC

## Where does the law go from here?

- ▶ Save for a successful SC appeal in another case, no significant expansion or modification to control mechanisms
- ▶ Aftermath concept is the only area where there has been some flexibility since *Alcock* (MR in *Novo*)
- ▶ Law Commission has criticised the PV/SV distinction
- ▶ Parliamentary intervention to extend scope of liability: highly unlikely under Coalition given its views on purported ‘compensation culture’

## (1) Court's approach since *Taylor v Novo*

- ▶ *Wild v Southend Hospital NHS Trust* [2014] EWHC 4053 (QB): thought to be first application of *Taylor v Novo* in clin neg context. Father's claim for shock from discovering unborn son had died in the womb and witnessing stillbirth failed.
- ▶ *Brock v Northampton General Hospital NHS Trust & another* [2014] EWHC 4244 (QB): parents claim for trauma of witnessing the consequences of clin neg following their daughter's overdose failed. However dreadful, there was no overt traumatic event.

## (2) Court's approach since *Taylor v Novo*

- ▶ *Berisha v Stone Superstore Ltd* (2014) LTL, 2<sup>nd</sup> December (Manchester CC; DJ Hassall): C's claim for shock of attending hospital 5 hours after partner suffered catastrophic brain injury at work; witnessing him on life support, observing his face swelling/becoming disfigured and the life support later turned off. Summary judgment granted to Defendant as C had no real prospect of establishing that she witnessed the 'immediate aftermath' of the accident.



## Secondary Victims Claims Workshop

We aim to please!

Charles Bagot

Hardwicke, London



Thank you!

Charles Bagot

+44 (0)20 7242 2523

[charles.bagot@hardwicke.co.uk](mailto:charles.bagot@hardwicke.co.uk)



[www.hardwicke.co.uk/people/bagot-charles](http://www.hardwicke.co.uk/people/bagot-charles)  
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