

# Nervous Shock Claims in Clinical Negligence Cases

by

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# Recap: the Guideline cases

- *Delieu v White* [1901] 2 KB 699 (pregnant barmaid)
- *Hambrooke v Stokes* [1925] 1 KB 141, CA (mother and lorry)
- *Bourhill v Young* [1943] AC 92 (pregnant fishwife)
- *McLoughlin v O'Brian* [1983] AC 410 (mother seeing husband and 3 children hours after RTA)
- *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (Hillsborough, family members)
- *Page v Smith* [1996] 1 AC 155 (psychiatric damage following RTA)
- *White (Frost) v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (Hillsborough, police on duty)



# The Control Mechanisms - *Alcock*

1. Marital or parental relationship between plaintiff and primary victim (now, “close ties of love and affection”)
2. Sudden and unexpected shock to the nervous system (now formulated as “the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind”)
3. Plaintiff personally present at the scene or witnessed the aftermath shortly afterwards (now, “propinquity in time and space for the causative event or its immediate aftermath”)
4. Injury was reasonably foreseeable; and
5. Injury consists of a recognised psychiatric illness which goes beyond grief, distress or sorrow.

# Variation on Control mechanism 2

- Mechanism 2 now split into:
  - Direction perception of the incident rather than, for example, hearing about it from a third person
  - Illness must have been induced by a sudden shocking event

(See *Ronayne* [2015] EWCA Civ 588§10)

# The Result

Lord Steyn

*“A patchwork quilt of distinctions which are difficult to justify”*

Lord Hoffman

*“It seems to me that in this area of the law, **the search for principle was called off in Alcock**. No one can pretend that the existing law, which your Lordships have to accept, was founded on principle...”*

*(White (Frost) v Chief Constable of S Yorks, pp 500 and 511)*



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# The Clinical Negligence cases

1. *Taylor v Somerset HA* [1993] PIQR P 262
2. *Sion v Hampstead HA* [1994] 5 Med LR 170
3. *North Glamorgan NHS Trust v Walters* [2003] PIQR P 16
4. *Froggatt v Chesterfield and N Derbyshire Royal Hospital NHS Trust* [QB] 13 December 2002
5. *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB)
6. *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB)
7. *Ronayne v Liverpool Women's Hospital NHS Foundation Trust* [2015] EWCA Civ 588
8. *Owers v Medway NHS Foundation Trust* [2015] EWHC 2363 (QB)
9. *Wells v University Hospital Southampton NHS FT* [2015] EWHC 2376 (QB)
10. *Tredget & Tredget v Bexley Health Authority* [1994] 5 Med.LR 178



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# Taylor v Somerset HA, per Auld J:

*“There are two notions implicit in [the immediate aftermath exception] cautiously introduced and cautiously continued by the House of Lords. They are of **(1) an external, traumatic, event** caused by the defendant's breach of duty which **immediately** causes some person injury or death; and **(2) a 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 consequence is brought home to him. **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.”*

# *Sion v Hampstead HA*, per Peter Gibson LJ:

*“I see no reason in logic why a breach of duty causing **an incident involving no violence or suddenness**, such as where the wrong medicine is negligently given to a hospital patient, could not lead to a claim for damages for nervous shock, for example where the negligence has fatal results and a visiting close relative, wholly unprepared for what has occurred, finds the body and thereby sustains a sudden and unexpected shock to the nervous system.”*



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# *Glamorgan v Walters, per Ward LJ*



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*[34] In my judgment on the facts of 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 as subsequently recollected was undoubtedly one drawn-out experience.*

*[43] Like Gibson LJ in Sion I **see no reason why liability for nervous shock in medical negligence cases involves any new application of principle.** The same principle is being applied even if the facts to which it is applied are new. To act within the parameters of principle does not involve an incremental step.*

# But what about *Taylor v Novo* [2014] QB 150?

**[33] ... the reasoning of Auld J in Taylor was correct. As I have explained at para 13 above, the observations of Peter Gibson LJ in Sion were obiter dicta and they are therefore not binding on this court.**

...

**[35] In Walters the court had to decide what was the event for the purposes of establishing a right of action as a secondary victim. The court was able on the facts of that case to hold that the event was a “seamless tale with an obvious beginning and an equally obvious end . . . played out over a period of 36 hours”. It was “one drawn-out experience”. I do not see how this sheds any light on the question that arises in this case where the injuries and death suffered by Mrs Taylor were certainly not part of a single event or seamless tale. The judge held (correctly) that the sustaining of the injuries and the death were distinct events. **The question whether the death, being a separate event, was a relevant event for the purposes of a claim by a secondary victim did not arise in Walters.****

# And then *Ronayne*



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*[11] It is unnecessary on this appeal to revisit the “control mechanisms” which regulate recovery in this field, which can be said to be both **arbitrary and pragmatic but which are well-understood, binding on us, and which were considered only very recently by this court in Taylor v Novo...***

*[36] ...here, there was in my judgment a series of events over a period of time. **There was no “inexorable progression”** and the Claimant's perception of what he saw on the two critical occasions was in each case conditioned or informed by the information which he had received in advance and by way of preparation.*



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# What counts as a shocking event?

## Two related issues:

1. What is the relevant event?
2. Was it horrifying?



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# The Relevant Event

## A. The Strict Approach

There is no flexibility in applying the rules. The shocking event must be the “first” consequence of the Defendant’s negligence. If it is later in time, it cannot be the relevant event for the purposes of the analysis.

*Taylor v Novo, Taylor v Somerset, Wild v Southend*

## B. The Flexible Approach

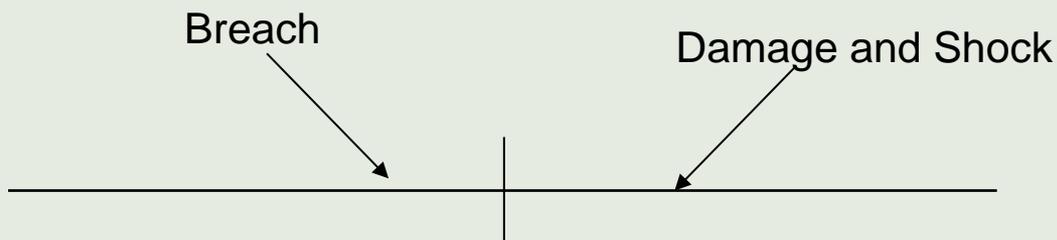
Each case is different and there must be some flexibility in applying the rules. The shocking event does not need to be the “first consequence” of the Defendant’s negligence; it may consist of a sequence of events as an “inexorable progression”.

*Sion v Hampstead, Walters v Glamorgan, Froggatt v Chesterfield*

# Relevant Event: the timeline

Negligence **synchronous** with the damage that causes the shock?

## Category A



Timeline

*McLoughlin v O'Brien*

*Tredgett v Bexley HA* [1994] 5 Med LR 178

Extended by "immediate aftermath"

*Galli-Atkinson v Seghal* [2003] Lloyds LR

## Category B



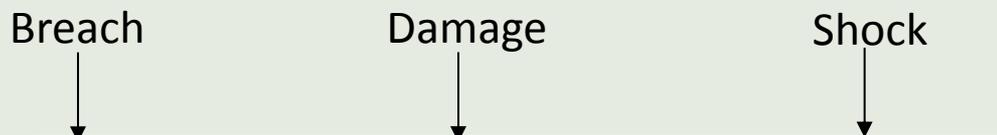
  
Timeline

*McLoughlin v O'Brien* (by logical extension)

*Wild v Southend* § 42:

*“[It was argued] not only the first consequence for the primary victim but the negligence itself must be synchronous with the sustaining of shock by the secondary victim. **That is arguably going too far...**”*

## Category C



  
Timeline

Controversy:

- (1) *Walters v Glamorgan*: can recover  
(arguably supported by *Ronayne* although CI lost on other grounds)
- (2) *Taylor v Novo*: cannot recover  
(supported by *Wild v Southend*)

## Possible answer

- if damage is seen and known, then it constitutes the relevant event (*Taylor v Novo*)
- if damage is unseen and unknown, then the relevant event is the first moment it becomes seen and known (*Walters v Glamorgan*)
- But compare *Young v MacVean* [2015] CSIH 70



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# Horrifying Event: Rules

- Event must be recognised as horrifying by a person of ordinary susceptibility (*Shorter* §214, *Ronayne* §13)
- Event must be outside the range of ordinary human experience, and more than simply distressing (*Ronayne* §14). “*What is required in order to found liability is something exceptional in nature [41].*”

# Horrorifying Event: Hospital Cases



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## **Ronayne:**

[17] ... there is ... only one reported case in which a claimant has succeeded at trial in a claim of this type in consequence of observing in a hospital setting the consequences of clinical negligence. That is in my view unsurprising. **In hospital one must expect to see patients connected to machines and drips, and ... expect to see things that one may not like to see. ....**

[18] **The exceptional case is Walters**, which had the unusual feature of a mother witnessing first hand her infant child undergoing a fit in consequence of negligence...

[33] .... The circumstances with which the Claimant was confronted in my judgment **fall far short** of those which have been recognised by the law as founding secondary victim liability.”

# Horrifying Event: inexorable progression?

- Present in:
  - *Walters*: 36 hours from convulsion to baby's death
- Not present in:
  - *Shorter*, gradual assaults on the mind
  - *Ronayne*, series of events over a period of time
  - *Owers*, not a “seamless tale”



# Horrorifying Event: Advance Warning

## **Walters:**

*[36]: "Information given as the events unfold before one's eyes is part of the circumstances of the case ..."*

## **Ronayne:**

*[36] "...there was in my judgment a series of events over a period of time ... the Claimant's perception of what he saw ... was ... conditioned or information by the information which he had received in advance and by way of preparation.*

...

*[41] ... at each stage in this sequence of events the Claimant was conditioned for what he was about to perceive"*

# Horrifying event: does that mean blood and gore?

## Yes

*McLoughlin v O'Brian*, present on facts

*Taylor v Somerset*, not present on facts, case failed

*Glamorgan v Walters*, present on facts

*Shorter v Surrey*, not present on facts, case failed

*Ronayne*, not present on facts, case failed

## No

*Sion v Hampstead*, not present on hypothetical facts

# Horrifying Event: Aftermath cases

- *McLoughlin v O'Brian*
- *Galli-Atkinson v Seghal* [2003] EWCA Civ 697



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# Footnote: Primary victims

- In cases of intra-uterine death, mother is the **primary victim**
- Mother can recover general damages, including damages for psychiatric injury, as primary victim: *Bagley v N Herts HA* NLJ 24 October 1986
- Father can only recover as a **secondary victim**, hence analysis of control mechanisms.
- See *Wild v Southend*:  
*[22] Even though the alleged secondary victim's shock-induced psychiatric illness may be more to do with his concern for the unborn child than for the mother, nevertheless his shock is a consequence of the injury or threatened injury to the mother in that her foetus is damaged or destroyed by the relevant negligent act. ..."*
- And now *Wells v University Hospital Southampton NHS FT* [2015] EWHC 2376 (QB): mother is a primary victim even if baby damaged in utero but born alive.

# Other Situations where it is arguable the Claimant is a primary victim

- Where the Claimant is an innocent participator in the events
- *W v Essex County Council* [2001] 2 AC 592
- *Robertson v Forth Road Bridge Joint Board*, 1995 SCLR 466

# Alcock [1992] 1 AC 310, Lord Oliver

Lord Oliver said:

- "The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable."



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# RECENT HIGH COURT CASE

- RE (A Minor By Her Mother & Litigation Friend Le) (First Claimant) (2) LE (Second Claimant) (3) DE (Fourth Claimant) V Calderdale & Huddersfield NHS Foundation Trust (2017)

# Strike Out Application

- Joanne Werb (Executor Of The Estate of George Werb (Deceased)) (2) Justin Werb V (1) Solent Nhs Trust (2) The Priory Hospital, Southampton (2017)



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# RECENT COUNTY COURT AND SCOTTISH CASES



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- Farnworth v Wrightington Wigan and Leigh  
NHS Foundation Trust 21  
December 2016
  - Tanner v Sarkar 12 December  
2016
  - Valerie Clowes v Embrace Group Ltd 14  
November 2016
  - Ann Doreen Morgan v Somerset  
Partnership NHSFT  
– 29 February 2016
  - Martha Sarah Young v Arthur MacVean  
29 September 2015

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