Taylor v. Novo – is this de novo for nervous shock?

1. We were just becoming used to a subtle judicial softening in the application of the strict, and arbitrary, Alcock control mechanisms in nervous shock claims. The Court of Appeal have now spun the roulette wheel again. The recent decision in Taylor v Novo [2013] PIQR P15, may have been welcomed by defendants but on closer analysis it has simply introduced a new degree of uncertainty, raising more questions than it answers. In this paper I will look at both sides of the argument.

The facts of Taylor

2. Mrs Taylor suffered an injury to her head and her left foot when as a result of the admitted negligence of a co-worker she was struck by collapsing shelves. She was making a good recovery when 20 days later she suddenly collapsed and died at home as a result of a pulmonary embolus (PE), the result of a DVT caused by the earlier accident at work. Her employer (A Novo UK Ltd) accepted liability for her death.

3. Mrs Taylor's daughter, Crystal, witnessed her mother's sudden collapse and death. As a result of the shock she developed significant PTSD.

4. Considering the Alcock controls the parties agreed on almost every issue. As the daughter of the deceased she was sufficiently closely related; she had suffered a recognized psychiatric illness; and it had been induced by shock in the legal sense of a sudden and violent agitation of the mind. The only issue was whether there was sufficient proximity between claimant and defendant.

The decision in Taylor

5. At first instance, in Chester County Court, HHJ Halbert found for the claimant. The defendant appealed and won. The Court of Appeal accepted the defendant's argument that there was insufficient proximity between the defendant's negligence and the claimant's injury three weeks later in a different place.

6. The Master of the Rolls said this:

"In the present case, Novo's negligence had two consequences which were separated by three weeks in time. The judge described them as two distinct events. The use of the word "event" has the tendency to distract. In reality there was a single accident or event (the falling of the stack of racking boards) which had two consequences. The first was the injuries to Mrs Taylor's head and arm; and the second (three weeks later) was her death. There was clearly a relationship of legal proximity between Novo and Mrs Taylor. Moreover, if Ms Taylor had been in physical proximity to her mother at the time of the accident and had suffered shock and psychiatric illness as a result of seeing the accident and the injuries sustained by her mother, she would have qualified as a

secondary victim on established principles But in my view, to allow Ms Taylor to recover as a secondary victim on the facts of the present case would be to go too far".

7. The Court of Appeal decided that the combination of time elapsed (three weeks with apparent recovery between initial injury and subsequent collapse/ death) and the fact that the claimant was not present at the time of the original accident meant that on the facts of this case there was insufficient proximity to allow the claimant to recover as a secondary victim.

The problem

8. The problem with Taylor is that the Master of the Rolls explained why on the facts of this case he would not find for the Claimant – there was insufficient 'proximity' but:
   a. in doing so he glosses over the decision of the Court of Appeal in Walters v. North Glamorgan NHS Trust [2002] EWCA Civ 1792, [2003] PIQR P16;
   b. and, partly in consequence, we are left in uncertain territory as to the circumstances where there would be 'sufficient proximity' in the future.

Alcock and Proximity

9. Whichever side of the argument you are on it is important to start with the House of Lords in Alcock [1992] 1 AC 310] since this remains the leading authority. This is what Lord Oliver said in Alcock about 'proximity' (410E):

"The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of "proximity" between the plaintiff and the defendant can be deduced. And, in the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction."

10. Then at 416D:

"*The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath."*

11. Note firstly that 'proximity' in these cases is being used in a different sense from 'proximity' when considering the existence of a duty of care in negligence.

12. Note secondly that 'proximity' is an artificial construct and apparently a vague one comprising two elements:

a. ‘physical and temporal propinquity’
b. ‘sudden and direct visual impression’

13. This meant in Alcock that those watching on live TV as their loved ones were crushed at Hillsborough could not recover for their psychiatric injury.

14. At Hillsborough breach of duty and injury all happened at the same time. Lord Oliver did not to consider whether ‘physical and temporal’ propinquity was required in respect of the breach and the injury suffered by primary and secondary victims.

Walters v. Glamorgan

15. This my real difficulty with the decision in Taylor. The Master of the Rolls acknowledged that Walters was the primary argument of the Claimant in the appeal but, I think significantly, does not set out the facts of that case in sufficient detail.

16. I set out below the entirety of what the Master of the Rolls says in Taylor about the facts of Walters:

“The claimant suffered a pathological grief reaction (a recognised psychiatric illness) as a result of witnessing the consequences of the negligent treatment of her son (E) including his death. As a result of negligent misdiagnosis, E suffered a major epileptic seizure leading to coma and irreparable brain damage. E was transferred to a London hospital and the following day the claimant was told by a consultant that E's brain damage was so severe that he would have no quality of life. The claimant and her husband then decided that E's life support should be terminated and E died in her arms approximately 36 hours after the seizure. The expert evidence was that she had suffered shock as a result of what she had witnessed. The judge held that she fell within the existing categories of secondary victims who were entitled to recover damages for psychiatric harm. The defendant appealed on the ground that the 36-hour period could not in law amount to a single horrifying event and that the judge had expanded the established control mechanisms for claimants with psychiatric injuries with insufficient regard to the recognised policy constraints against innovation in this field of the law.”

17. Practitioners relying on Walters have really only focused on the length of time (36 hours) between the baby’s first fit and her death. The appeal in Walters was all about whether those 36 hours could properly be regarded as an ‘event’. The Court of Appeal agreed with Thomas J. that for the purposes of considering whether the claimant was entitled to damages for nervous shock they were.

18. What I don't understand is why in Taylor the Court of Appeal did not go further than looking at this 36 hour period in Walters. Why didn't they ask '*when was the breach of duty"*?

19. In Walters in the Court of Appeal Ward LJ did not think it important to identify the date of the breach of duty and this information is not included in his judgment. The appeal focused on what was happening in the 36 hour period with which we are now all so familiar.

20. If we go back to Thomas J at first instance there is not much more in his judgment to say when the breach of duty was but it appears to have been about a fortnight before the ''36 hours". See paragraph 5 of the judgment:
"5. On Tuesday July 16, 1996 she noticed that the colour of Elliot's eyes looked different. On July 17, 1996 she took him to see her general practitioner. He referred Elliot to the Prince Charles Hospital at Merthyr. Elliot was seen that day at the Prince Charles Hospital. Thereafter he was treated under the care of the Prince Charles Hospital, most of the time as an in-patient, but part of the time as an outpatient. The claimant was with him during his treatment.

"6. Elliot was in fact suffering from acute hepatitis which led to fulminant hepatic failure. It is accepted by the defendants that he was not properly diagnosed or treated by the Prince Charles Hospital. The defendants also accept that if Elliot had been properly diagnosed and treated, he would have undergone a liver transplant and lived. It is not therefore necessary to set out the precise course of treatment and events until the period immediately preceding his death. It is, however, necessary to set out the events of the last two days as it is common ground on the psychiatric evidence that they caused her psychiatric illness."

21. It seems likely therefore that the defendant's breach of duty started on 17th July (he was jaundiced on admission and this was not picked up). The breach may well have continued, but we don't know from the judgment. The first fit, which starts the 36 hour period, was not until 3am on 30th July i.e some 13 days later.

Is Walters consistent with Taylor?

22. I think this is arguable both ways. You can say that Walters was (probably) a case of a continuing breach of duty (a failure to diagnose), that mum was (presumably) with her baby throughout, that the baby deteriorates and when the baby becomes critically and visibility ill (i.e. when the fitting starts) mum is there. There is therefore no identifiable gap between breach of duty and causation. This is a very different situation from Taylor where you have a one-off breach of duty followed immediately by the first consequence – physical injury to head and foot. There is then a 20 day interval

before the second consequence – the PE and death which causes the claimant's psychological injury.

23. The counter-argument is that, so far as we can tell from the judgments, there was an initial breach of duty in Walters, the failure of diagnosis of jaundice, and then an interval of 13 days before the consequences of that breach of duty became apparent – the fitting. This is conceptually very similar to Taylor: breach of duty and then an interval of 20 days before the (material) physical consequence.

24. What if Mrs Taylor had not suffered any significant injury on the day of her accident? What if the only significant consequence of the collapsed shelves had been her PE 20 days later? There is no negligence without damage. If the claimant was present when the only damage was suffered (PE and death) why should she not recover? Would the Court of Appeal have found for her on those facts? Why should a claimant be disqualified where there is an initial, minor injury and then a gap before the second injury?

Application to clinical negligence

25. To me two things stand out. The first is that at House of Lords/ Supreme Court level where proximity is discussed there is no guidance as to whether this is proximity to breach or the consequent injury to the primary victim. The second is that the Master of the Rolls specifically restricts Taylor to its facts, stating that he cannot find for her on the '*facts of the present case'*.

26. For defendants Taylor raises the possibility of defending claims which would previously have been conceded. You should ask yourself – is there a time delay between breach of duty and the psychological injury? Better still, does the primary victim suffer an earlier injury as in Taylor, which makes it easier to argue that there is too big a gap between the breach of duty and the 'nervous shock'?

27. For claimants, don't panic. Look at the facts and consider whether your case is more Taylor (isolated breach, clear water between then and injury to secondary victim) or more Walters (continuing breach with short, blurred gap between breach and injury to primary and secondary victims). Remember that Taylor was decided on its facts and may well be distinguishable.

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