

Nervous Shock Claims

Who Recovers?

Introduction

1. As can be seen from the New York Times article, the phrase “*nervous shock*” in the context of personal injury litigation, unlike “*stress at work*”, finds its origins in the 19th century. It has been criticised as an inappropriate shorthand for claims for psychiatric injury but it remains the shorthand of choice for many. What do we mean when we refer to claims for nervous shock?
2. A claim for nervous shock is a claim for damages for psychiatric injury where the claimant has not suffered any physical injury. It includes claimants who were at risk of physical injury but only sustained psychiatric injury; it includes claimants who were never at risk of physical injury but sustained psychiatric injury as a result of witnessing injury to another or believing that another was at risk of injury; it includes rescuers and those who are lead to believe that they were responsible for an accident which resulted or might have resulted in injury to another.
3. This is not an easy topic:

“To the law of tort falls the important task of distinguishing between cases in which the victim of another’s carelessness should be entitled to compensation and cases in which no claim should lie. In no area is this task more difficult or more contentious than where the victim’s claim is based on psychiatric damage suffered as a result of exposure to the effects of that carelessness on another. When can a claimant recover damages for what was once called nervous shock.” (Lord Bingham in the Foreword to *Mullany & Handford’s Tort Liability for Psychiatric Damage* (2nd Edition))

4. The law in this area is far from satisfactory. Parliamentary intervention would be welcomed but is long overdue:

“My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. The second is it to abolish all the special limiting rules applicable to psychiatric harm. ... In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the *Alcock* case [1992] 1 A.C. 310 and *Page v. Smith* [1996] A.C. 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of a compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.” (Lord Steyn in *Frost v. Chief Constable of South Yorkshire* [1999] A.C. 455 HL @ 500B).

“It seems to me that in this area of the law, the search for principle was called off in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle. I agree with Jane Stapleton’s remark that ‘*once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular cause of action, incrementalism cannot provide the answer*’: see *The Frontiers of Liability*, vol 2, p.87.

Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another.” (Lord Hoffman in *Frost* @ 511B).

5. The purpose of this paper is to draw together the principles of liability in claims for nervous shock and to analyse the areas of ongoing controversy.
6. This paper does not include a detailed (or even a superficial) analysis of claims for stress at work. That is a difficult topic in its own right, best left for another occasion. Where stress at work claims are of relevance to the issues addressed then they will be touched upon but not explored in great detail.

First principles

7. The established core principles appear to be as follows¹:
- a. In every case, the claimant must have suffered a recognised psychiatric disorder as opposed to mere grief, anger or anxiety.
 - b. A claimant exposed by a negligent act or omission to the risk of physical injury can recover if the act or omission causes him psychiatric injury, even if psychiatric injury itself was not reasonably foreseeable (*Page v. Smith*)².
 - c. A rescuer who objectively exposes himself to danger can recover, whether the psychiatric injury is caused by fear for his own safety or horror at what he sees (*Frost v. Chief Constable of South Yorkshire Police*).
 - d. A rescuer who reasonably believed that he was exposing himself to danger can recover, whether the psychiatric injury is caused by fear for his own safety or horror at what he sees (*Frost v. Chief Constable of South Yorkshire Police*).
 - e. Where the negligent act or omission of the defendant has put the claimant in the position of being, or thinking that he is about to be or has been, the involuntary cause of another's death or injury and the psychiatric injury stems from the shock to the claimant of this supposed fact, then that claimant can recover (Lord Oliver in *Alcock* @ 408F).
 - f. All other claimants who sustain psychiatric injury as a result of witnessing death or injury of another, or perceive the risk of death or injury to another, are subject to the following *control mechanisms*:

¹ See the analysis of Lord Phillips MR in the Personal Injury Bar Association Annual lecture: “*Liability for psychiatric injury*” (2004) (www.piba.org.uk).

² It is not clear whether the claimant has to establish that the psychiatric injury was caused by fear for his own safety or whether shock at witnessing the suffering of others will suffice (see Lord Phillips, *supra*, at p.14).

- i. It must be reasonably foreseeable that a person of “*normal fortitude*” or “*ordinary phlegm*” might suffer psychiatric injury by shock (per Lord Lloyd in *Page v. Smith*)³.
 - ii. There must be a close relationship of love and affection between the person killed or injured (“*the primary victim*”) and the claimant (“*the secondary victim*”) (Lord Ackner in *Alcock*).
 - iii. The claimant must be in close proximity in space and time to the accident or its immediate aftermath (Lord Ackner in *Alcock*).
 - iv. The psychiatric injury must result from a sudden shock (Lord Ackner in *Alcock*).
 - v. The psychiatric injury must be caused by seeing or hearing the accident or its aftermath, rather than being told about it (Lord Ackner in *Alcock*).
8. In such an unsatisfactory “*corner of the law*”, whilst the principles might well be settled, controversy remains.

Primary and secondary victims

9. The distinction between primary and secondary victims is a crucial step in the analysis of nervous shock claims: it is only the secondary victim who has to satisfy the control mechanisms. How do we define who is a primary victim and who is a secondary victim?
10. According to Lord Lloyd in *Page*,

“In the present case, by contrast, the plaintiff was a participant. He was himself directly involved in the accident, and well within the reasonable range of foreseeable physical injury. He was the primary victim. ... In *Alcock* Lord Keith of Kinkel said that in the type of case which was then before the House, injury by psychiatric illness ‘is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person’. In the same case

³ Arguably this is the essence of the tort as opposed to a control mechanism: injury to a claimant must be a foreseeable consequence of the defendant’s conduct. I include it here as (a) Lord Lloyd specifically defined it as a control mechanism in *Page*, and (ii) to remind the reader that it has to be established. It is highly likely that it will be established if the “true” control mechanisms (ii-v) are established.

Lord Oliver of Aylmerton said of cases in which damages are claimed for nervous shock: ‘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.’ Later in the same speech, he referred to those who are involved in an accident as the primary victims, and to those who are not directly involved, but who suffer from what they see or hear as the secondary victims. This is, in my opinion, the most convenient and appropriate terminology.”

11. With the greatest of respect to Lord Lloyd, it is wrong to say that Lord Oliver went on to refer to those who are involved or participants in an accident as “*primary victims*”. Lord Oliver’s use of the phrase “*primary victim*” was used purely in the context of a claim by a “*secondary victim*” to denote the person who was injured or the claimant believed had been injured as a result of the defendant’s negligence. He did not define, in terms of proximity or foreseeability, those who qualified as primary victims; it was not necessary for him to do so. His use of the phrase “*primary victim*” was purely for the purpose of identifying the person actually injured or who the claimant believed might be injured: it was not an attempt to define a specific category of claimant for the purposes of liability for psychiatric injury.
12. Why does this matter? Lord Lloyd appears to define the primary victim as a person who was “*well within the range of foreseeable physical injury*”. Not only does he define the primary victim by reference to reasonable foreseeability of physical injury, he proceeds to make it a pre-requisite of liability to the primary victim:

“None of these [control] mechanisms are required in the case of a primary victim. **Since liability depends on foreseeability of physical injury** there could be no question of the defendant finding himself liable to all the world. Proximity of relationship cannot arise, and proximity in time and space goes without saying.” (**emphasis** added) (760b).

13. Subsequently, Lord Goff sought to argue, as the lone dissenting voice in *Frost*, that Lord Lloyd did not intend to hold that presence in the range of physical injury was a necessary attribute of the primary victim. Lord Steyn, in the majority⁴, disagreed,

“Lord Lloyd said that a plaintiff who had been within the range of foreseeable injury was a primary victim. Mr Page fulfilled the requirement and could in principle recover compensation for psychiatric loss. In my view it follows that all other victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the control mechanisms laid down in the *Alcock* case. There has been criticism of this classification But if the narrow formulation by Lord Lloyd of Berwick of who may be a primary victim is kept in mind, this classification ought not to produce inconsistent results. In any event, the decision of the House of lords in *Page v. Smith* [1996] A.C. 155 was plainly intended, in the context of pure psychiatric harm, to narrow the range of potential secondary victims. The reasoning of Lord Lloyd and the Law Lords who agreed with him was based on concerns about an ever widening circle of plaintiffs.” (496H-497C).

14. It is suggested that Lord Lloyd’s mistaken reading of Lord Oliver’s judgment in *Alcock* contributed to the decision in *Page* where it was held that the “*primary victim*” need only establish foreseeability of physical injury and need not establish foreseeability of psychiatric injury. Whether that be right or wrong, the definition of the primary victim by reference to the foreseeable risk of physical injury now seems well established:

“Where psychiatric harm is suffered, the law distinguishes between ‘primary’ and ‘secondary’ victims. A primary victim is usually someone within the zone of foreseeable physical harm should the defendant fail to take reasonable care: see *Page v. Smith* [1996] AC 155. A secondary victim is usually someone outside that zone: typically, such a victim foreseeably suffers psychiatric harm through seeing, hearing or learning of physical harm tortiously inflicted upon others.” (per Hale LJ in *Hatton v. Sutherland* [2002] EWCA Civ 76)⁵

⁴ Lord Browne-Wilkinson agreed with reasons given by Lord Steyn and Lord Hoffman. Lord Hoffman did not express a concluded view on the point.

⁵ One wonders whether Hale L.J.’s use of “*usually*” was as subtle as it might appear.

15. But what of the claimant who was a “*participant*”, suffers psychiatric injury but was never at risk of physical injury? Consider *Farrell v. Avon Health Authority* [2001] All ER (D) 17⁶. In that case a father attended hospital following the birth of his son. On arrival he was told that the baby had died. He was given the dead baby to hold. In fact the dead baby was not his; his son was alive and well. The father was told this about 20 minutes later and taken to see his son. He claimed damages for psychiatric injury (PTSD) as a result of what happened at the hospital. The Judge held that Mr Farrell was a primary victim. However, he was never at risk of physical injury. How could it be said that he was at reasonably foreseeable risk of physical injury as a result of being misinformed that his son was dead or by being given the dead baby to hold? The Judge held,

“On this purely factual basis, the claimant here is clearly a primary victim as he was physically involved in the incident itself. Indeed, that also accords with common sense. How can there be a secondary victim if there is no other person who was physically involved in the incident as a potential victim. What is more, if the parents of a sexually abused child in *W v. Essex County Council* [2000] 1 AER 227 may feasibly fall within the ambit of primary victims, as the House of Lords found, that adds strength to my view here that in common sense and law the claimant should also be regarded here as a primary victim.

In the result, although I have not found the cases straightforward in their application, as the claimant is a primary victim it is therefore sufficient for him to show that the defendant ought to have had psychiatric injury in its contemplation. If the foreseeability test is then fulfilled the defendant must then taken the claimant as it finds him.” (Transcript @ 41A-F)

16. That finding does not sit with the judgments of Lord Lloyd in *Page* or Lord Steyn in *Frost*. In fact the Judge himself recognised that fact,

“On a literal reading of this passage (Lord Steyn in *Page, supra*), of course, the claimant is to be regarded as a secondary victim although a principal participant in the incident itself, whereas Lord Steyn did not himself adopt a classification based on participation.” (Transcript @ 36G)

⁶ HHJ Bursell QC sitting as a High Court Judge.

17. In my opinion the Judge’s rejection of the “*literal reading*” of Lord Steyn (and Lord Lloyd) is unconvincing. The ultimate outcome of finding a duty and liability to the father is both admirable and, to my mind, correct. However, the Judge’s course in arriving at that outcome was unsatisfactory in terms of the application of authority.
18. This point is important in clinical negligence claims where the claimant is a family member in theatre with or at the bedside of a loved one. Such a claimant will rarely if ever be at foreseeable risk of physical injury as a result of the defendant’s negligence in caring for the loved one. On the basis of Lord Lloyd in *Page* and Lord Steyn in *Frost*, such a claimant would have to satisfy all of the control mechanisms in order to establish liability (see for example *Walters v. North Glamorgan NHS Trust* [2002] EWCA Civ 1792). But why should they have to do so when they are participants in the events, obviously proximate to the events in both time and space? If a sleeping rear seat passenger in a collision between two cars is to be regarded as a primary victim in a road traffic accident, why is the alert mother who (presumably) gives consent on behalf of her ill son and remains at his bedside throughout his time in hospital not in a similar position?
19. As might now be self-evident, in my opinion, Lord Lloyd’s definition of a primary victim as a person at reasonably foreseeable risk of physical injury, and all others as secondary victim is, unsatisfactory. That reasonable foreseeability of physical injury is a pre-requisite to recovery as a primary victim is equally unsatisfactory. *Page v. Smith* should be reconsidered. The opportunity to do this might prove elusive. That said, it might be an opportunity which the Supreme Court would welcome:

“54. The first point concerns the somewhat controversial decision of this House in *Page v. Smith* [1996] AC 155. As Lord Bingham has explained, neither party has criticised that decision, let alone invited the House to review it. At least for my part, I understood that was the position of the employer because, even if we had been persuaded that *Page* was wrongly decided, that would not have ensured the success of this appeal. I agree. Accordingly, not least in the light of the trenchant observations of Lord Goff of Chieveley in *Frost v. Chief Constable of South Yorkshire Police* [1999] 2 AC

455 at 473D to 480F, I would not want to appear to prejudice any decision as to the correctness of the majority view in *Page*, if it comes to be challenged before your Lordship's House on another occasion." (Lord Neuberger in *Corr v. IBC Vehicles Ltd* [2008] UKHL 13)

The importance of the nature and scope of the duty

20. Every action in negligence depends upon foreseeability of injury and the existence of a duty of care. The claim for physical injury by the primary victim is an obvious example. In order to succeed the secondary victim must establish a duty of care. Psychiatric injury must be reasonably foreseeable. But, as set out above, that in itself is not sufficient to establish liability; it is not sufficient to establish a duty of care. The secondary victim establishes proximity and therefore the duty of care by satisfying the control mechanisms (see Lord Oliver in *Alcock*). The secondary victim's claim is not parasitic upon the success of the primary victim's claim⁷; it requires a sufficient degree of proximity between the secondary victim and the defendant, and with sufficient proximity there exists a duty of care.
21. What of the secondary victim claimant who is already owed a duty of care by the defendant? In *Frost v. Chief constable of South Yorkshire Police* [1999] 2 A.C. 455 (HL), four police officers who were on duty in the stadium at the Hillsborough tragedy brought claims for psychiatric injury. Another officer who was not on duty in the stadium at the time of the tragedy but who had been responsible for stripping bodies and completing casualty forms at the hospital brought a claim for psychiatric injury. These were representative claims in, effectively, group litigation. The four officers claimed damages for what they witnessed at Hillsborough. In the case of the fifth officer, for what he saw in the immediate aftermath. They argued that the Chief Constable owed them a duty of care to protect them from personal injury (physical and psychiatric), they qualified as primary victims and did not therefore have to satisfy the control mechanisms. Their alternative

⁷ Although the defendant's negligence has to result in injury or the risk of injury to the primary victim.

argument was that they qualified as rescuers. Both arguments were rejected by the House of Lords:

“The law of master and servant is not a discrete and separate branch of the law of tort, but is to be considered in relation to actions in tort generally. Here we are considering the tort of negligence and the nature of the duty of care owed by one who negligently creates a catastrophic situation. In order that there shall be some limits to the consequences of the negligence for which the defendant is to be made liable the law imposes the controls I have discussed in the *Alcock* case [1992] 1 A.C. 310.

In my view these should apply to all those not directly imperilled or who reasonably believe themselves to be imperilled, irrespective of whether they are employees or not. Accordingly, I would allow the appeals in so far as the police rely upon their status as employees.” (Lord Griffiths @ 464E)⁸

“The rules to be applied when an employee brings an action against his employer for harm suffered at his workplace are the rules of tort. One is therefore thrown back to the ordinary rules of the law of tort which contain restrictions on the recovery of compensation for psychiatric harm. This way of putting the case [the employment argument] does not therefore advance the case of the police officers. The duty of an employer to safeguard his employees from harm could also be formulated in contract. ... But such a term could not be wider in scope than the duty imposed by the law of tort. Again one is thrown back to the ordinary rules of the law of tort. The first way of formulating the argument based on the duty of an employer does not therefore assist the police officers.” (Lord Steyn @ 497H)

“The second theme is on analysing an argument as to where the justice lay on this occasion. One is considering the claims of police officers who sustained serious psychiatric harm in the course of performing and assisting in their duties in harrowing circumstances. That is a weighty moral argument: the police perform their duties for the benefit of us all. The difficulty is, however, twofold. First, the pragmatic rules governing the recovery of damages for pure psychiatric harm do not at present include police officers who sustains such injuries while on duty. If such a category were to be created by judicial decision, the new principle would be available in many different situations, e.g. doctors and hospital workers who are exposed to the sight of grievous injuries and

⁸ Note Lord Griffiths’ creation of his own definition of a primary victim.

suffering. Secondly, it is common ground that police officers who are traumatised by something they encounter in their work have the benefit of statutory schemes which permit them to retire on pension. In this sense they are already better off than bereaved relatives who were not allowed to recover in the *Alcock* case. The claim of the police officers on our sympathy, and the justice of the case, is great but not as great as that of others whom the law denies redress.” (Lord Steyn @ 498).

“[Regarding the rescuer argument] The specific difficulty counsel [for the plaintiffs] faces is that it is common ground that none of the four police officers were at any time exposed to personal danger and none thought that they were so exposed. Counsel submitted that this is not a requirement. He sought comfort in the general observations in the *Alcock* case of Lord Oliver about the category of “participants”. In order to recover compensation for pure psychiatric harm as a rescuer it is not necessary to establish that his psychiatric condition was caused by the perception of personal danger. ... But in order to contain the concept of rescuer in reasonable bounds for the purposes of the recovery of compensation for pure psychiatric harm the plaintiff must at least satisfy the threshold question that he objectively exposed himself to danger or reasonably believed that he was doing so. Without such limitation one would have the underlying spectacle that, while bereaved relatives are not allowed to recover as in the *Alcock* case, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover. For my part the limitation of actual or apprehended dangers is what proximity in this special situation means.” (Lord Steyn at 499A and 499F).

“The relationship of employer and employee establishes the employee as a person to whom the employer owes a duty of care. But this tells one nothing about the circumstances in which he will be liable for a particular type of injury. For this one must look to the general law concerning the type of injury which has been suffered.” (Lord Hoffman @ 505G)

“Should then your Lordships take the incremental step of extending liability for psychiatric injury to ‘rescuers’ (a class who would now require definition) who give assistance at or after some disaster without coming within the range of foreseeable physical injury?

In my opinion there are two reasons why your Lordships should not do so. The less important reason is the definitional problem to which I have alluded. The concept of a rescuer as someone who puts himself in danger of physical injury is easy to understand. But once the notion is extended to include others who give assistance, the line between them and bystanders becomes difficult to draw with any precision.

But the more important reason for not extending the law is that in my opinion the result would be quite unacceptable. . . . I think that such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another; at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.” (Lord Hoffman @ 509H-510F).

22. Where injury is sustained as a result of witnessing the suffering (or apprehended suffering) of a primary victim, is the existence of a pre-existing duty of care therefore wholly irrelevant? No.
23. The issues to consider are the nature and scope of the pre-existing duty of care. *Frost* is authority for the proposition that a pre-existing employer/employee duty of care does not of itself extend to a duty to prevent psychiatric injury in the secondary victim scenario: the employee is in the same position as every other secondary victim. However, a claimant who suffers psychiatric injury as a result of witnessing death or injury of another (or the apprehension of such) might be owed a pre-existing duty to take reasonable care to prevent psychiatric injury which does extend to what would otherwise be a secondary victim scenario.
24. In *Butchart v. The Home Office* [2006] EWCA Civ 239, Mr Butchart was a prisoner on remand at Winchester Prison. His case was that, to the knowledge of the prison authorities, he was psychiatrically vulnerable and unstable in that he was in a depressed and unstable condition, threatening self harm and at one time suicidal. He alleged that despite this knowledge, the authorities placed him in a cell with another prisoner who was a known suicide risk. That prisoner did commit suicide. Mr Butchart claimed he suffered psychiatric injury, “*Because of the stress related by being placed in the same cell as that fellow prisoner, the prisoner’s*

suicide itself, the fact that he said he was blamed by a prison officer for that suicide, and was subsequently placed in a cell with another suicidal prisoner?

25. The Home Office sought to strike out the claim on the basis that Mr Buthcart was a secondary victim and could not satisfy the control mechanisms, specifically the requirement of ties of love and affection with the primary victim. That argument was rejected by the Judge and by the Court of Appeal,

“14. If, in truth, the present claim could and should be categorised as the appellant submits that it should [as simply a claim by a bystander secondary victim], that would be a formidable argument.

15. But it is unnecessary, in my view, to analyse in any detail the line of authority which culminated in *Frost* in order to determine whether or not the control mechanisms relevant to the type of claim with which that case was concerned had been met in the present case. I do not read the respondent’s claim in the present case as being one which is narrowly based upon the effects of Ian Holms’s suicide and accordingly a ‘*nervous shock*’ case. The particulars of claim make it clear, in my view, that the psychiatric injury which the respondent alleges that he ultimately suffered was the result of a breach of a primary duty of care owed to him.

17. The real question, in my view, is whether or not the relationship between the appellant and the respondent gave rise to a duty of care which encompassed a duty to take reasonable steps to avoid psychiatric harm. In the present case there is no doubt that the appellant owed a duty of care to those in its custody. The House of Lords in *Reeves –v- Commissioner of the Police of the Metropolis* [2000] AC 360 held that the police owed a duty of care to those in its custody, which could in certain circumstances include a duty to take reasonable steps to prevent a prisoner from taking his own life. This was reiterated by this Court in *Orange –v- Chief Constable of West Yorkshire Police* [2002] QB 347. The question is whether or not the scope of that duty which can generally be described as a duty to take reasonable steps to ensure the health and safety of a prisoner encompassed taking reasonable steps to protect a prisoner from psychiatric harm.

20. As I have said, what has to be determined is the nature and potential scope of the duty of care in the light of the relationship between the claimant and defendant. In the present case, the question is, therefore whether or not on the pleaded facts, the appellant could have owed a duty of care to the respondent to take reasonable steps to avoid causing him psychiatric harm. In my view

the pleaded facts are sufficient to establish, if proved, that the appellant knew or ought to have known that the respondent was a prisoner vulnerable to psychiatric harm. In those circumstances it seems to me to be inevitable that the duty of care which the appellant owed to the respondent included a duty to take reasonable steps to minimise the risk of psychiatric harm.” (Latham L.J.)

26. The shortest paragraph in Lord Justice Latham’s judgment in *Butchart* is this,

“16. As Lord Hoffman said at page 504F in *Frost*:

‘The control mechanisms were plainly never intended to apply to all cases of psychiatric injury.’”

27. The same point emerges from another decision of the Court of Appeal, this time in the stress at work arena. One of the claimants in *Hartman and Others v. South Essex Mental and Community Care NHS Trust and Others* [2005] EWCA Civ 06, was a Mr Melville, a prison healthcare worker, who suffered psychiatric injury when he had to cut down the body of a prisoner who had committed suicide, remove a ligature and attempt revival. This was the eighth occasion on which he had to perform this task. The duty of care issue was tried as a preliminary issue. The Circuit Judge at first instance, the High Court Judge on appeal and the Court of Appeal all found that it was reasonably foreseeable that employees in the claimant’s position as a class might suffer psychiatric injury. That was sufficient to establish the duty of care; it wasn’t the mere fact of the employer/employee relationship which gave rise to the duty to prevent psychiatric harm but the fact that it was reasonably foreseeable that employees undertaking the work which the claimant was undertaking might suffer psychiatric injury, therefore reasonable steps had to be taken to prevent such injury. Mr Melville, did not have to satisfy the control mechanisms applicable to secondary victim claims.

28. Finally, what of your position as solicitors? Might you be liable for the psychiatric injury suffered by a client as a result of your handling of his or her claim? Possibly. In *McLoughlin v. Jones* [2002] QB 1312 (CA), the Court of Appeal held,

“[I]n a claim for damages for psychiatric illness where the relationship between the parties was founded in contract, regardless of whether the breach of duty relied on was a breach of a contractual term or a breach of a duty of care arising from the contractual relationship which sounded in damages in tort, the court had first to identify whether and in what circumstances the defendant might have owed the claimant a duty to assist him in avoiding psychiatric illness before determining whether the psychiatric illness was a foreseeable consequence of a breach of that duty; that it was arguable that the purpose of the defendant’s engagement was that they should exercise reasonable skill and care in preparing the claimant’s case for trial in such a way to minimise the risks of a wrongful conviction and of his suffering psychiatric illness should he be convicted, and on that basis the defendants should be deemed to have assumed responsibility for those consequences; that if such psychiatric illness was foreseeable, it would be fair, just and reasonable for the claimant, as a primary victim, to recover compensation; ...” (Headnote @ 1312E-G)

Reasonable foreseeability

29. It is a pre-requisite to every claim in negligence that injury was reasonably foreseeable. Skipping over the issues of foreseeability in primary victim claims and the controversy surrounding *Page*, what of foreseeability in secondary victim claims?
30. First, psychiatric injury has to be reasonably foreseeable. On any view, whether one adopts Lord Lloyd’s definition of the primary victim as within the range of foreseeable physical injury and the secondary victim as falling outside that zone, or some form of participant test, the secondary victim claimant is someone who was not at foreseeable risk of physical injury. By definition, if he is to establish that injury was foreseeable then he has to establish that psychiatric injury was foreseeable.
31. As set out above, according to Lord Lloyd, reasonable foreseeability of psychiatric injury to a person of “*normal fortitude*” or “*ordinary phlegm*” is one of the control mechanisms in secondary victim claims. Whether one considers reasonable foreseeability to be a control mechanism in the strict sense or simply a fundamental principle of the law negligence, it still has to be established in every secondary victim case. However, Lord Lloyd’s assertion

in *Page* that foreseeability of injury in the person of “*normal fortitude*” is one of the specific control mechanisms in secondary victim claims may be of some importance.

32. Consider the following situation. A primary victim is injured in an accident where it is not reasonably foreseeable that a bystander of normal fortitude might suffer psychiatric injury as a result of witnessing the accident and injury to the primary victim. However, to the defendant’s knowledge, the bystander is not someone of normal fortitude and is particularly vulnerable to psychiatric injury. Consider the mother with a substantial history of anxiety and depression, at the bedside of her child. The child suffers injury as a result of the defendant’s negligence. The circumstances of that injury are not horrifying and would not be expected to result in psychiatric injury to a mother of “*ordinary phlegm*”. But what of this mother with her known history of psychiatric vulnerability? Is she owed a duty of care if she establishes that the defendant knew of her pre-existing vulnerability and therefore it was reasonably foreseeable that she might suffer psychiatric injury? If the control mechanisms are intended to establish proximity, surely she has sufficient proximity (in time, space and in terms of her relationship with the defendant) and need not satisfy Lord Lloyd’s additional control mechanism, but need only establish reasonable foreseeability to her, not the hypothetical person of “*normal fortitude*”.

Rescuers

33. I have touched on this category already but it is a specific category of claimant⁹.
34. A rescuer must establish (i) that he provided more than “*trivial or peripheral assistance*”, and (ii) that objectively he exposed himself to danger, or reasonably believed he was so doing (see *Frost* and the decision of George Legatt QC (sitting as a High Court Judge) in *Monk v. PC Harrington Limited and Others* [2008] EWHC 1879 (QB) @ para.23). By so doing he establishes the requisite foreseeability, proximity and duty of care.

⁹ Though not a “*specialty privileged category of plaintiff*” (Lord Hoffman in *Frost* @ 508G).

35. If a rescuer meets those criteria, proves negligence and establishes that he suffered a recognised psychiatric disorder, then he will succeed. Even if the cause of his psychiatric injury is witnessing the suffering of others rather than fear for his own safety, he will recover damages without the having to satisfy the secondary victim control mechanisms:

“In order to recover compensation for pure psychiatric harm as rescuer it is not necessary to establish that his psychiatric condition was caused by the perception of personal danger.” (Lord Steyn in *Frost* @ 499G).

The unwilling participant

36. An unwilling participant can recover damages where,

“... [T]he negligent act of the defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another’s death or injury and the illness complained of stems from the shock to the plaintiff of the consequences of this supposed fact.”
(Lord Oliver in *Alcock* @ 408F).

37. Whilst the unwilling participant category appears to be an exception to the secondary victim rules, the claimant still has to establish proximity to the event or its immediate aftermath in order to succeed.

38. In *Hunter v. British Coal Corporation* [1999] QB 140 (CA), the Court of Appeal refused to extend the category of “*unwilling participants*” to a situation where the claimant thought he had been the cause of a fatal accident to a fellow employee but did not witness the accident or its immediate aftermath and was told that his colleague had died about 15 minutes after the accident had occurred. According to Brooke L.J.,

“The law requires a greater degree of physical and temporal proximity than was present in this case before [the claimant] could properly be treated as a direct or primary victim.” (@ 154).

39. There is then the issue of whether the claimant’s belief that he was about to be or had been the cause of another’s death or injury must be reasonable. This issue was specifically considered by George Legatt QC in *Monk v. PC Harrington Ltd*, *supra*,

“It is true that no express reference is made by Lord Oliver in his formulation of the relevant test in

Alcock to a requirement that the claimant's belief should have been reasonable. But I cannot accept that an unreasonable belief is sufficient, for two reasons. First, the law is clear that causing someone to believe that their own safety is directly threatened is not sufficient to make them a primary victim, unless the belief is reasonable. Thus, in Hegarty v EE Caledonia Ltd, decided at the same time as McFarlane v Wilkinson [1997] 2 Lloyd's Rep 259, the claimant was on a support vessel when a series of explosions destroyed the oilrig, Piper Alpha. At one point, when the support vessel was about 100 metres from the rig, a fire ball came towards it. The claimant suffered a fear for his life when he saw the fireball coming towards the vessel, but the fireball fizzled out over 50 metres away from where he was and he was never in any actual danger. The Court of Appeal upheld the judge's finding that on these facts the claimant was not a primary victim as his fear was not a reasonable one. Brooke LJ said (at p.271):

"The law does not ... accommodate people who are not directly threatened but who genuinely and irrationally believe that they are, because their dilemma is not reasonably foreseeable."

Although it is necessary to be cautious about reasoning by analogy in this area of the law which is governed more by policy than principle, it would in my view be wholly illogical if a person who genuinely but irrationally believes that he has caused an accident could recover as a primary victim when a person present at the scene who genuinely but irrationally believes that is in danger of death or injury cannot do so.

48. The second reason is that underlying the need to show a reasonable basis for the claimant's belief, as the above quotation from Brooke LJ indicates, is the requirement of foreseeability. Before a defendant can be held liable to the claimant on the basis that the defendant's negligence has put the claimant in the position of believing that he has caused the accident, it must in principle be shown that such a belief was a consequence of the defendant's negligent conduct which could reasonably have been foreseen. This requirement is reflected in Lord Oliver's statement of the test in Alcock at p.408F, that "*the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event*" (my emphasis). An unreasonable belief that the claimant has caused the event is not a reasonably foreseeable consequence of the defendant's negligent conduct for which the defendant can be held responsible. In each of the three cases cited by Lord Oliver this test was satisfied because the claimant's belief that he had been instrumental in causing death or injury to another person was reasonable. For example, in Dooley, supra, at p.277, Donovan J found

that the fear of the crane operator that the load which he was conveying might have injured some of his fellow workmen when it fell was ‘*not baseless or extravagant*’ and ‘*was not unreasonable in the circumstances*.’”

40. I would be inclined to agree with that analysis.

How shocking must the event be?

41. In order to succeed, a secondary victim must establish that his psychiatric injury was caused by shock. Shock, in this context, has been defined in the following terms,

“... [N]or can the scenes [on the television] reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system.” (Lord Keith in *Alcock* @ 398G).

“(5) ‘Shock’ in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.” (Lord Ackner in *Alcock* @ 401F).

42. That defines shock, the assault on the senses, but how shocking does the event have to be? Does it have to be particularly horrific or violent?

43. The starting point must be that the event has to be such that it is reasonably foreseeable that it would cause psychiatric injury. On the basis of Lord Lloyd’s additional control mechanism, it has to be an event which could foreseeably result in psychiatric injury to a person of “*normal fortitude*” or “*ordinary phlegm*”¹⁰. But does that mean that the event has to be violent or gruesome to qualify?

44. This issue was raised but did not have to be decided by the Court of Appeal in *Sion v. Hampstead Health Authority* [1994] 5 Med LR 170 (CA). In that case the defendant health authority applied to strike out the claimant’s claim for damages for psychiatric injury allegedly caused by witnessing the deterioration and death of his son over a 14 day period. The Judge struck out the claim as disclosing no cause of action on account of the absence of any element of “*shock*”. The Court of Appeal upheld that decision, finding that the

¹⁰ Putting to one side the argument as to whether this is in fact a control mechanism.

father's psychiatric injury was attributable to a continuing process over the 14 day period, culminating in the expected death of his son, rather than being due to the sudden appreciation by sight or sound of a horrifying event. Of interest, however, are the comments of Peter Gibson L.J.,

“Mr Whitfield submitted that the Plaintiff's claim could not succeed because the injuries to or death of a primary victim in themselves of itself do not qualify as the horrifying event causing the shock needed for a valid claim. He said that it was a precondition of a claim that the incident which resulted from a breach of duty should have the characteristics of suddenness and violence additional to the injuries or death of the primary victim, and contended that this was demonstrated by the doctrine that a plaintiff may recover if affected by the immediate aftermath of the horrifying event. He relied for these submissions on *Taylor v. Somerset Health Authority* [1993] 4 Med LR 34 at page 37 where Auld J accepted an argument on similar lines. I am not persuaded by this argument.

It is of course correct that in most of the decided cases there has been a sudden and violent incident resulting from a breach of duty, but it is the sudden awareness, violently agitating the mind, of what is occurring or has occurred that is the crucial ingredient of shock. In the *McLoughlin* case Lord Wilberforce (at pp 417-418) said that the critical question to be decided was whether the wife and mother, who had not been present at the scene of the grievous injuries to her family but who in hospital came upon those injuries at an interval of time and space, could recover damages for nervous shock, and he held that she could. 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.

In *Jeans v. Coffey* (1984) CLR 549 at page 567 Brennan J gave his understanding of 'shock':
'... the sudden sensory perception, that is, by seeing or hearing or touching, of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the Plaintiff's mind can causes a recognisable psychiatric illness'.

That, in my respectful opinion, encompasses the essential elements of 'shock' and does not include the additional elements for which Mr Whitfield contended.”¹¹ (p.176)

45. The observations of Lord Justice Peter Gibson were quoted without apparent dissent by the Court of Appeal in *Walters v. North Glamorgan NHS Trust* [2002] EWCA Civ 1792. When framing the issues to be decided, the Court in *Walters* identified the issue as whether the entire event witnessed by the claimant was “*horrifying*”. It did not identify the issue by reference to the event having any special characteristics of violence or suddenness. As stated by Ward L.J.,

“36. The question then is whether this entire event was "horrifying". For my part the facts only have to be stated for the test to be satisfied. This mother awakens to find her baby rigid after a convulsion. Blood is coming from his mouth. He is choking. Is that not as much an assault upon her senses as if her child had been involved in a road accident, suffered grievous head injuries as yet undetected and was found bleeding in the car seat? Her fear and anxiety was undoubtedly calmed not long afterwards when given an incorrect medical opinion that it was very unlikely and would be very unlucky if Elliot had suffered serious damage. Every mother would seize upon the good news for her comfort to reduce the impact of the horror. Consequently, all the more likely it is that she should have felt numb, panic stricken and terrified by the sudden turn of events when she arrived at King's College Hospital. That left her stunned. As the consultant observed she "responded as if half in a dream × in a state of emotional shock". Her hopes were lifted then they were dashed and finally destroyed when shortly thereafter she was advised to terminate treatment on the life support machine. That she should have felt that "this was a complete shock" seems to me to be inevitable. That her immediate reaction should have been one of anger is understandable. Anger is part of the grieving process. But the agreed medical evidence made it plain that the combination of events "witnessed and experienced" caused her pathological grief reaction and was different from a normal grief reaction. They must have been chilling moments, truly shocking events, as the experts agreed in answer to the seventh question put to them, and thus amply justifying the conclusion that this was a horrifying event. I have no difficulty in saying, as Lord Wilberforce did:—

¹¹ Staughton L.J. did not comment on the issue; Waite L.J. agreed with the reasons given by Staughton L.J. and Peter Gibson L.J.

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

46. I would suggest that the focus of attention for the “*shock*” requirement is upon the impact upon the claimant, not the nature of the event. The “*horrifying*” nature of the event is relevant to the issue of reasonable foreseeability.

Extending the event and the immediate aftermath

47. It is beyond debate that a secondary victim claimant can claim compensation as a result of witnessing the accident itself or its immediate aftermath (assuming all of the other control mechanisms and other conditions are satisfied). What is far more controversial is defining the limit of “*the event*” and “*the immediate aftermath*”. Consideration of two cases illustrates this.
48. In *Walters v. North Glamorgan NHS Trust*, *supra*, Mrs Walters’ son was admitted to the defendant hospital. It was admitted that there was a negligent failure to diagnose and treat the son’s condition, acute hepatitis. Had that condition been diagnosed the son, Elliot, would have undergone a liver transplant and would probably have lived. His condition deteriorated. His mother remained at his bedside. The crucial events began when Mrs Walters awoke at about 3:00am on 30th July 1996, to find Elliot making small choking noises in his cot (he was 10 months old at the time), with large amounts of “*a coffee ground blood substance*”; Elliot’s body was stiff.
49. Mrs Walters was informed by a nurse that she believed that Elliot had had a fit. Shortly thereafter the Claimant was advised that it was very unlikely that Elliot had suffered any serious damage as a result of the fit. In fact he had suffered a major epileptic seizure leading to a coma and irreparable brain damage. At about 11:00am, Mrs Walters was told by a doctor that a CAT scan had shown no damage to Elliot’s brain, but that he wanted Elliot transferred to Kings College hospital, London for a liver transplant.

50. Elliot was transferred to Kings, arriving there at 6:30pm. The Claimant followed the ambulance in a car with her husband. She arrived at Kings at about 9:00pm, about 18 hours after the initial fit. She was seen by the doctors and advised that Elliot had in fact suffered severe brain damage as a result of the fit and was on a life support machine; the chances of a successful liver transplant were 50-50; if he survived, Elliot would be severely handicapped. Mrs Walters was numb, panic stricken and terrified at the sudden turn of events.
51. The following day, 31st July, the doctors advised Mrs Walters that the brain damage was so severe that Elliot would not have any quality of life. This shocked her greatly. Mr and Mrs Walters took the decision to terminate life support. Elliot died in his mother's arms at about 4:30pm, just over 36 hours after the initial fit.
52. The Judge accepted that all of those events in the 36 hour period formed a single horrifying event. His decision was upheld by the Court of Appeal:

“34. In my judgment the law as presently formulated does permit a realistic view being taken from case to case of what constitutes the necessary "event". Our task is not to construe the word as if it had appeared in legislation but to gather the sense of the word in order to inform the principle to be drawn from the various authorities. As a word, it has a wide meaning as shown by its definition in the Concise Oxford Dictionary as: "An item in a sports programme, or the programme as a whole". It is a useful metaphor or at least a convenient description for the "fact and consequence of the defendant's negligence", per Lord Wilberforce, or the series of events which make up the entire event beginning with the negligent infliction of damage through to the conclusion of the immediate aftermath whenever that may be. It is a matter of judgment from case to case depending on the facts and circumstance of each case. 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.” (Ward L.J.)

And,

“36. The question then is whether this entire event was "horrifying". For my part the facts only have to be stated for the test to be satisfied. This mother awakens to find her baby rigid after a convulsion. Blood is coming from his mouth. He is choking. Is that not as much an assault upon her senses as if her child had been involved in a road accident, suffered grievous head injuries as yet undetected and was found bleeding in the car seat? Her fear and anxiety was undoubtedly calmed not long afterwards when given an incorrect medical opinion that it was very unlikely and would be very unlucky if Elliot had suffered serious damage. Every mother would seize upon the good news for her comfort to reduce the impact of the horror. Consequently, all the more likely it is that she should have felt numb, panic stricken and terrified by the sudden turn of events when she arrived at King's College Hospital. That left her stunned. As the consultant observed she "responded as if half in a dream × in a state of emotional shock". Her hopes were lifted then they were dashed and finally destroyed when shortly thereafter she was advised to terminate treatment on the life support machine. That she should have felt that "this was a complete shock" seems to me to be inevitable. That her immediate reaction should have been one of anger is understandable. Anger is part of the grieving process. But the agreed medical evidence made it plain that the combination of events "witnessed and experienced" caused her pathological grief reaction and was different from a normal grief reaction. They must have been chilling moments, truly shocking events, as the experts agreed in answer to the seventh question put to them, and thus amply justifying the conclusion that this was a horrifying event. I have no difficulty in saying, as Lord Wilberforce did:—

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

37. It follows that in my judgment the judge was not only entitled to find the facts as he did in the claimant's favour but also bound to do so. I can see no error in his finding of the material facts and his application of the principles of law to those findings.” (Ward L.J.)

53. There is then the decision in *Galli-Atkinson v. Seghal* [2003] EWCA Civ 697. The facts can be taken from the judgment of Latham L.J.,

“1. On 12th January 1998 Livia, the 16-year old daughter of the appellant, was killed when the respondent's car mounted the pavement and struck her. There is no doubt that the appellant suffered a significant psychiatric disorder as a result of her daughter's death for which she claims damages. Her claim was dismissed by Mr Recorder Wood in the Central London County Court. She now appeals to this court against that decision.

2. The accident happened when Livia was walking the half mile or so to a ballet class at about 7 pm. She had asked the appellant if she would drive her down. The appellant said no and told her she could walk. The accident itself happened at about 7.05. An ambulance arrived reasonably promptly at just after 7.10. It was immediately apparent to the paramedic who attended her that Livia was severely injured. He summoned further assistance. A doctor subsequently arrived. Despite every effort made by the ambulance team she was pronounced dead at 7.40. The ambulance took her to the mortuary. Her injuries were horrific. The paramedic who treated her had to receive treatment afterwards as a result of the effect of the accident on him.

3. Livia's father returned home at about 7.45, which was about the time that her ballet class was due to end. She had not returned by 8.05. Her father decided to drive to where the ballet class was held to collect her. He was diverted because the accident scene had been cordoned off by the police. When he got to the ballet class he expected to find Livia waiting there because she could not get past the police cordon. On discovering that she was not there he rang the appellant who, despite his protestations, said that she was coming down herself. The father then learned of Livia's death from one of the police officers at the scene. Not unnaturally he broke down. He did, however, manage to telephone home. The appellant had left by then; but Bianca, Livia's older sister, was there. He told her. Meanwhile, the appellant had reached the police cordon. She tried to cross the tape, and when confronted by a policeman told him that she was looking for her daughter. Her account was that she was then asked the name of her daughter. When she gave it and asked whether the cordon was something to do with her, the police officer said, yes, she was dead. The news had a profound effect upon the appellant. She screamed hysterically and collapsed to the ground. One of the police officers present described her screaming as unforgettable. Another described it as horrific. Her

husband on hearing the screams went to the scene where he found her completely beside herself.

The police tried to control her.

4. From the appellant's evidence the judge concluded that she was aware of police cars at the scene but not of an ambulance, and that there was no evidence that she saw anything of the consequences of the accident, apart from the cordoning tapes. The police asked the appellant and her husband whether they wanted to see their daughter. Despite her husband's objections the appellant said that she did. A police car was provided. They first went back home to find Bianca, who had herself become distraught and left home to be returned by a police car which had found her wandering in a nearby street.

5. The appellant, her husband and Bianca went together to the mortuary. It is clear that the appellant was, not unnaturally, in denial at that stage. They arrived at about 9.15. Livia's father went in first and identified Livia. He came out and confirmed to the appellant that it was her. The appellant fell to her knees, sobbing uncontrollably. She would not be helped to her feet but crawled to where Livia lay on the trolley bed. She pulled herself up and saw Livia's injured face and the upper part of her body, although the lower part, which was grotesquely distorted, had been covered by a blanket. She cradled her, saying that she was cold. Seeing and holding Livia's body must have been devastating to the appellant. Although the worst injuries were hidden, her face and head were disfigured."

54. The Judge rejected the claimant's claim on two grounds: (1) he rejected the argument that what happened in the mortuary formed part of the immediate aftermath, finding instead that it was purely to identify the daughter; and (2) he concluded that the claimant's psychiatric injury was not caused by anything that she saw but by the shocking news she was given as soon as she reached the police tape. The Court of Appeal said the Judge was wrong to make those findings. With regard to the former, the Court held:

"25. In approaching that question, I do not consider that we are restricted by what Lord Ackner said in *Alcock* to a frozen moment in time. As Lord Wilberforce in *McLoughlin* recognised from the passage that he cited from *Benson v Lee*, an event itself may be made up of a number of components. This was accepted by this court in the case of *North Glamorgan NHS Trust v Walters* [2002] EWCA 1792. Likewise, in my judgment, can the aftermath, provided that the events alleged to constitute the aftermath retain sufficient proximity to the event. Indeed, the decision in *McLoughlin*'s case can

itself only be justified if the events in the hospital, when Mrs McLoughlin went to the hospital, are taken together as providing the trigger, if that is the right description, for the shock which produced the psychiatric illness.

26. In the present case, the immediate aftermath, in my view, extended from the moment of the accident until the moment that the appellant left the mortuary. The judge artificially separated out the mortuary visit from what was an uninterrupted sequence of events, quite unlike the visit to the mortuary under consideration in *Alcock*. The visit with which we are concerned was not merely to identify the body. It was to complete the story so far as the appellant was concerned, who clearly at that stage did not want - and one can understand this - to believe that her child was dead.

27. Accordingly, in my judgment the judge was wrong to have excluded what happened at the mortuary from consideration. If, therefore, it could properly be said, on the basis of the psychiatric evidence, that the whole of that sequence of events which was witnessed by the appellant played a part in producing the illness from which she undoubtedly suffered, then the appellant is entitled to succeed in her claim.” (Latham L.J.)

55. Each case will depend upon its own facts. Defining the event and its immediate aftermath is a question of fact and degree. What these cases show perhaps is a willingness on the part of the senior judiciary to at least recognise that the event and its immediate aftermath are not simply the accident itself and the first moments or hours at the scene or initially in the A&E casualty area¹².

56. If one is looking for some guidance as to what is required in order to establish a prolonged “*event*”, the following observation of Ward L.J. in *Walters* might be a useful starting point, “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.” (para.34)

¹² Perhaps in contrast to the view of Mr Recorder Hill in *Farmer v. Outokumpu Stainless Limited* (Sheffield County Court), unreported, 19th May 2006, who did not refer to *Walters* or *Galli-Atkinson*.

Material contribution, causation and apportionment

57. Causation of psychiatric injury is often multi-factorial. Factors usually sited include pre-existing vulnerability, coincidental stressful life events, non-tortious aspects of the index events¹³ and subsequent stressful live events. As a result we often see expert psychiatric reports where the psychiatrist has assessed the causative potency of the various factors factor and made a percentage assessment of the relative contribution of each. That percentage assessment routinely finds its way into the assessment of damages as some form of apportionment. Should that be the case?
58. In *Q₂ PLC v. Dickens* [2008] EWCA Civ 1144, the claimant sought damages following a breakdown where, as the Judge found, it was reasonably foreseeable that the claimant's workload was adversely affecting her mental health and the employer failed to take reasonable steps to relieve the claimant's situation. The Judge failed to apply the correct test for causation, however, the Court of Appeal found that the employer's breach of duty made a material contribution to the claimant's psychiatric illness (mixed anxiety and depression or a depressive illness). The Judge apportioned 50% of the claimant's psychiatric injury to the employer's breach of duty and 50% to other non-tortious factors (pre-existing vulnerability, emotional stress at home and the claimant having to live away from home). The Judge awarded the claimant 50% of the total value of her claim.
59. It is of note that there does not appear to have been any expert evidence addressing the causative potency of the tortuous and non-tortious factors, nor apparently was there any expert evidence as to the claimant's likely mental state absent the employer's breach of duty. Notwithstanding the absence of such evidence, the Judge made a broad brush (unsurprising) 50:50 apportionment. The parties agreed that the Judge should apportion

¹³ For example the "ordinary" stress and anxiety associated with giving birth, as opposed to the negligently caused stress and anxiety caused by mismanaging the later stages of the delivery.

the damages; neither complained about the actual apportionment on the appeal. The majority of the Court of Appeal was not satisfied that this was the correct approach.

60. Lady Justice Smith made the following *obiter* comments,

“44. In my experience, apportionment of the whole of the damages is usually carried out only in cases where the injury is divisible. In such cases the seriousness of the medical condition in question is often related to the degree of exposure to the agent causing it; in other words the condition is ‘dose-related’. The true nature of such cases is that the tort has caused only part of the overall injury. The only practicable way of assessing the right sum for the relevant part may be to assess the damages for the whole injury and to apportion them on the basis of an assessment of the tortious and non-tortious exposures. This is possible in cases such as dust exposure, noise-induced deafness and hand/arm vibration syndrome. In other cases, the true nature of the case may be that the tort has aggravated an existing condition or injury and it may be that the only practicable way of assessing the effect of the aggravation is by an across the board apportionment of the total loss. I am doubtful of the applicability of this type of approach to a case of psychiatric injury where there are multiple causes of the breakdown.

... ..

46. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than *de minimis*) and where the injury to which that has lead is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But my provisional view is that there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.”

61. Lord Justice Sedley added the following,

“53. I am troubled by the shared assumption about the appropriateness of apportionment on which the case has proceeded. While the law does not expect tortfeasors to pay for damage that they have not caused, it regards them as having caused damage to which they have materially

contributed. Such damage may be limited in its arithmetical purchase where one can quantify the possibility that it would have occurred sooner or later in any event; but that is quite different from apportioning the damage itself between tortious and non-tortious causes. The latter may become admissible where the aetiology of the injury makes it truly divisible, but that is not this case.”

62. Those comments, as recognised by Smith L.J. and Sedley L.J., appear to contradict the judgment of Hale L.J. in *Hatton v. Sutherland* [2002] ICR 613. In that stress at work claim, Lady Justice Hale stated,

“41. Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire. Nor is there anything in *Bonnington Castings v Wardlaw* [1956] AC 613 or *McGhee v National Coal Board* [1973] 1 WLR 1 requiring a different approach.”

63. However, these were not Lady Justice Hale’s only comments on the topic; they have to be seen in the context of her other observations,

“36. Many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should pay only for that proportion of the harm suffered for which he by his wrongdoing is responsible: ...

...

37. It is different if the harm is truly indivisible : a tortfeasor who has made a material contribution is liable for the whole, although he may be able to seek contribution from other joint or concurrent tortfeasors who have also contributed to the injury.”

And later, when setting out the practical propositions to be derived from the *Hatton* Judgment, she said this,

“(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, **unless the harm is truly indivisible**. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42).” (**emphasis** added).

64. I would respectfully suggest that the *obiter* conclusions of Smith L.J. and Sedley L.J. in Q₂ are not inconsistent with the totality of the *obiter* conclusions of Hale L.J.¹⁴. If the claimant’s injury in Q₂ was an indivisible injury (as suggested by Smith L.J. at para.42) then that would not be a situation where Hale L.J. would appear to advocate apportionment (see Hatton paras.37 and 43(15) above). The correct approach, I suspect shared by Hale, Smith and Sedley L.JJ., is as follows:

- a. On the balance of probabilities, would the claimant have suffered psychiatric illness absent the defendant’s negligence? If so, what illness would he have suffered and over what period.
- b. If not, was there a risk that absent the defendant’s negligence the claimant might suffer psychiatric illness at some point in any event? If so, the claimant’s damages (or parts of it) may be reduced to reflect such possibility.
- c. If the claimant would have suffered some psychiatric illness in any event, has the defendant’s negligence aggravated or exacerbated such illness? If so, to what extent has it aggravated or exacerbated the illness? The claimant’s damages (or parts of it) will be reduced to reflect the extent of aggravation or exacerbation.
- d. If it is impossible to say, on the balance of probabilities, whether the claimant would or would not have suffered psychiatric illness absent the defendant’s negligence, did the defendant’s negligence make a material contribution to the claimant’s psychiatric illness?¹⁵
- e. If so, in principle the claimant is entitled to damages for the entirety of his psychiatric illness, subject to reduction to reflect the risk, if any, that in the future

¹⁴ The issue of apportionment did not actually arise in Hatton.

¹⁵ For further analysis of material contribution see Bailey v. MOD [2008] EWCA Civ 883.

he might have suffered psychiatric illness absent the defendant's negligence. The claimant's damages (or parts of it) may be reduced to reflect such possibility.

65. The Judge's error in Q₂ was his failure to identify the absence of any expert or other meaningful evidence as to the prospect that the non-tortious factors would or might have resulted in psychiatric illness at some point in any event; he apportioned damages simply on the basis that the non-tortious factors had contributed to the claimant's illness without evidence as to whether she would in fact have suffered any psychiatric injury in the absence of the defendant's negligence; he confused contribution to injury with the assessment of extent of attributable injury.

Conclusion

66. Save for the core principles set out at the beginning, there are few hard and fast rules in this area of the common law. At least some of those core principles remain controversial and do not receive universal approval across the other common law jurisdictions. Where have we come to in terms of defining the boundaries of claims for nervous shock? I think we are arguably little further on than Lord Bridge was in McLoughlin:

“I find myself in complete agreement with Tobriner J. in Dillon v. Leg, 29 A.L.R. 3d 13136, 1326 that the defendant's duty must depend on reasonable foreseeability and

‘must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance in the future.’

To put the matter another way, if asked where the thing is to stop, I should answer, in an adaptation of the language of Lord Wright (in Bourhill v. Young [1943] A.C.92, 110) and Stephenson L.J. [1981] Q.B. 599, 612, ‘where in the particular case the good sense of the judge, enlightened by a progressive awareness of mental illness, decides.’ (443C-E)

**Byrom Street Chambers
Manchester**

**DARRYL ALLEN
20th May 2010**