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Case No CC2005APP0234

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday, 21 April 2005

B e f o r e :

THE HONOURABLE MRS JUSTICE HALLETT D.B.E.

B E T W E E N:

ROBERT BARRY WHITE — **Claimant**

- v -

LIDL UK GMBH — **Defendant**

MR S TAYLOR QC appeared on behalf of THE APPELLANT/CLAIMANT.
MR WALKER appeared on behalf of THE RESPONDENT/DEFENDANT.

HTML VERSION OF JUDGMENT (AS APPROVED BY THE COURT)

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Mrs Justice Hallett:

1. The appellant appeals against the order of District Judge Crosse sitting in Exeter on 26 August 2004 by which the appellant's claim for personal injury was struck out. The District Judge granted permission for this appeal to proceed.

2. The primary victim of the respondent's admitted negligence was the appellant's wife, Denise. On 18 June 2000 she went to the respondent's supermarket in Torquay to do some shopping. As she was driving from the car park the crash barrier, which had been repeatedly vandalised and not properly maintained, swung out without warning and went through her windscreen. It missed her head by inches. She escaped with only minor physical injury - a tissue injury to her left shoulder. The appellant went to the scene. He saw the effect of the impact on the car and his wife, but he was not traumatised by the events of that day.

3. However, Mrs White's mental state deteriorated until on 14 December she committed suicide. Mr White found his wife hanging. He did everything possible to revive her. He watched as paramedics did their best to save her. A decision was taken later at hospital to switch off her life support machine and she died in the early hours of the next morning.

4. Not surprisingly, Mr White was badly traumatised by the events of 14 and 15 December. He has been diagnosed as suffering from post-traumatic stress disorder, a major depressive episode and pathological grief reaction. Clearly Mr White has suffered considerably as a result of his wife's death and the circumstances of it. I am sure he has everyone's heart-felt sympathy. In discussing this case, as we must in strictly legal terms, I can assure Mr White that we have not forgotten the human tragedy

which prompts this debate.

5. According to a consultant psychiatrist, Dr Veasey, it was the appellant's finding of his wife's body and his attempts at resuscitating her which have triggered his post-traumatic stress disorder. Thus Mr Taylor QC on his behalf argues that the claimant's psychiatric injuries were caused or materially contributed to by his wife's suicide or its immediate aftermath. He has been unable to work since September 2002. Dr Veasey also opined that, as a result of the accident at the respondent's car park, Mrs White developed the major psychiatric reaction which subsequently led to her suicide. Mr Taylor argues, therefore, that Mr White's injuries were caused by the respondent's negligence. I have been asked to assume for the purposes of this appeal that there was such a causal link between the respondent's negligence, Mrs White's suicide and the appellant's psychiatric condition.

6. The issue before me as defined by Mr Taylor is whether the appellant's claim for psychiatric injury falls within the recognised criteria for secondary victims; and, if not, whether those criteria should be extended so as to include it.

7. In order to establish a claim as a secondary victim, the appellant must prove that the respondent owed him a duty of care, the essential principles of law in relation to which are to be found in the speeches of the House of Lords in two cases, McLoughlin v O'Brian and Others [1983] 1 AC 410 and Alcock and Others v Chief Constable of South Yorkshire Police [1992] 1 AC 310 . Giving the first speech in McLoughlin Lord Wilberforce at page 418 set out the position in law in 1983:

    > "While damages cannot at common law be awarded for grief and sorrow, a claim for damages for nervous shock caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. A plaintiff may recover damages for nervous shock brought on by injury caused not to himself or herself but to a near relative or by the fear of such injury. Subject to the next paragraph there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In Hambrook v Stokes Brothers [1925] 1 KB 141 an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case. An exception from, or I would prefer to call it an extension of, the latter case has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved."

    Implicit in those words were a number of "control mechanisms", limiting the class of people whose claims can be recognised.

8. A potential claimant must establish what Mr Taylor described as legal proximity and spatial and temporal propinquity. To establish legal proximity, Mr Taylor suggested, it is helpful to return to basic principles and the neighbour test established many years ago in Donoghue v Stevenson [1932] AC 562 . Lord Atkin at page 580 therein defined a neighbour for these purposes to include "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected". As Lord Wilberforce said in McLoughlin at page 420:

    > "This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value and justice, to have been in contemplation."

    In McLoughlin the plaintiff was the mother of a child who died almost immediately following a horrific road traffic accident in which her husband and two other children were injured. She was at home at the time of the accident, but went to the hospital immediately she heard what had happened. She saw two of her children and her husband covered in blood and oil with significant injuries, in much the same condition as they would have been if she had witnessed the accident itself. She was told her other child was dead. The House of Lords upheld her claim. At page 417-1418 Lord Wilberforce said:

    > "The critical question to be decided is whether a person in the position of the appellant, ie one who is not present at the scene of grievous injuries to her family but who comes upon those injuries at an interval of time and space can recover damages for nervous shock."

At page 421 he went on to say:

> "We must then consider the policy arguments. In doing so, we must bear in mind that cases of nervous shock and the possibility of claiming damages for it are not necessarily confined to those arising out of an accident on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence, or at least to those in close or very close proximity to such a situation."

As regards proximity, Lord Wilberforce said that it was obvious that this must be close in both time and space to the accident. But as he explained at page 422:

> "It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the nervous shock."

Upon those words Mr Taylor placed considerable reliance.

9. He reminded me that the so-called floodgates argument was specifically referred to, but rejected, by their Lordships in McLoughlin . At page 443, for example, Lord Bridge observed:

> "My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture, which would deny justice to some who, in the application of the classic principles of negligence derived from Donoghue v Stevenson ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims."

10. In Alcock the House of Lords had to consider claims brought by relatives or friends of spectators involved in the Hillsborough disaster. Lords Keith and Ackner agreed with Lord Wilberforce in McLoughlin that the law needed to place some limitation on the extent of claims. The House considered the class of people who might bring themselves within the category of those who could claim and said in terms that the claimant had to establish proximity to the accident in time and space. At page 399 Lord Ackner said:

> "Since the decision of your Lordships' House in McLoughlin v O'Brian , if not earlier, it is established law that (1) a claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury; (2) a claim for damages for such illness can be made when the shock results (a) from death or injury to the plaintiff's spouse or child, or the fear of such death or injury; and (b) the shock has come about through the sight or hearing of the event or its immediate aftermath."

11. Mr Taylor rightly conceded that their Lordships repeatedly related proximity of time and space to the accident or the event, meaning the Hillsborough disaster itself. He submitted, however, that these qualifications must be read in the context of the facts of that case. In Alcock there was just the one event with which the court was concerned, hence the references to people being within sight and hearing of "the" event and to an element of physical proximity to the event. He argues that the event for the purposes of the instant case is the shocking event that causes the claimant injury. Provided the chain of causation can be established, a secondary party in the position of this appellant should be able to sue for an injury which is "the fact and consequence" of the respondent's negligence. The appellant's injuries were caused by the shock of witnessing his wife's suicide and its immediate aftermath. In short, Mr Taylor argued that this case succeeds if the shocking event is categorised as the suicide, but fails if it is categorised as the accident since, although the appellant may have been close in time and space to the accident, he was not shocked by it. Thus we have spent some time in the half day allowed for argument on the question of what constitutes the relevant event for the purposes of this case.

12. Mr Taylor was critical of the District Judge's judgment in the court below. In his skeleton argument he said that it was difficult to distil any clear reasoning from the judgment.

13. Given the demands upon a district judge's time and the complexity of the competing arguments in this case, that is perhaps a little harsh. As the District Judge accepted, he did not have the opportunity fully to review the relevant case law.

14. Mr Taylor reminded me that the judge said in terms that it was "the shock of his wife's death and not the negligent event that caused his injury". Mr Taylor argues that the District Judge did not explain why the accident as opposed to the suicide should be categorised in law as the relevant event. The judge referred to the long delay between what he called "the negligent event and the horrifying event" of the suicide. But in this case it is likely that the operative negligence (the failure to deal with the vandalism) pre-dated even the accident by some time. Since the causal link between the defendant's negligence and the suicide is to be assumed, there is no reason why the suicide cannot be described as the relevant shocking event. Given that the suicide was a shocking event which was caused by the respondent's breach of duty, there is no adequate explanation as to why liability should not attach on the basis of the decided case law.

15. Mr Taylor further submitted that the principal reason that the judge found against the appellant appears to be that he did not consider that the event of the deceased's suicide could have been reasonably foreseen. However, he said that this misstates the law. The test is one of hindsight. Mr Taylor reminded me of the observations of Lords Wilberforce and Bridge in McLoughlin . Lord Wilberforce, for example, at page 420 said:

> "Foreseeability which involves a hypothetical person looking with hindsight at an event which has occurred is a formula adopted by the English law, not merely for defining but also for limiting the persons to whom duty may be owed and the consequences for which an actor may be responsible."

Mr Taylor invited me to find that it is clearly arguable that with the benefit of hindsight the injury to the appellant in this case could have been foreseen.

16. In the course of his judgment the District Judge gave an example of a case in which a person is injured and dies six months later. The District Judge concluded that no claim can be brought for psychiatric injury of another person as a result of the death in those circumstances. Assuming that the person dies peacefully and that there is no shocking event, Mr Taylor accepted this interpretation of the law as correct. However, he argued that on that scenario there would be no shocking event over and above the natural grief of a loving spouse. On the judge's own findings, he said, it was the shock of witnessing the horrifying event of his wife's suicide that caused the appellant's injury. It is this feature which is missing from the cases involving a progressive assault on the mind, for example, where a parent suffers psychiatric injury as a result of the pressure and strain associated with caring for a brain-damaged child.

17. Mr Taylor also reminded me that in Frost v Chief Constable of South Yorkshire Police [1999] 2 AC 455 , at 500, Lord Steyn described the law in the area of pure psychiatric harm as "a patchwork quilt of distinctions which are difficult to justify". Lord Hoffmann observed at page 511 that the search for principle was "called off" in Alcock . At page 472 Lord Goff summarised the requirements of the law regarding proximity for secondary victims as follows:

> "It has become settled that to establish the necessary proximity a secondary victim must show: (1) a close tie of love and affection to the immediate victim; (2) closeness in time and space to the incident or its aftermath; and (3) perception by sight or hearing, or its equivalent, of the event or its aftermath."

For Mr Taylor's purposes that begs the question as to which is the event with which we should be concerned?

18. Mr Taylor argued forcefully that the elements which go to make up legal proximity are not fixed, as is demonstrated by the way in which the House of Lords has approached the question of the nature of the relationship a secondary victim must establish to be sufficiently close for these purposes. The law has developed from allowing claims by close relatives to allowing claims by those with "a close tie of love and affection". Mr Taylor argued that the courts have deliberately allowed themselves a degree of flexibility in this area so as to do justice where possible and that ultimately the decision as to whether a negligent defendant must pay damages to a secondary victim can be left to the good sense of a trial judge.

19. Mr Taylor referred me to the decision in W v Essex [2000] 2 AC 592 . In that case the House of Lords was considering a strike-out application in relation to a claim brought by foster parents who suffered psychiatric injury as a result of a known sexual abuser being placed in their family. The parents discovered the incidents of sexual assault four weeks after they occurred. Lord Slynn giving the leading speech said at page 662:

> "It is right to recall that in McLoughlin Lord Scarman at page 430C-E recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions."

Adopting that approach, Lord Slynn went on to say at page 663:

> "Whilst I accept there has to be some temporal and spatial limitation on the persons who can claim to be secondary victims very much for the reasons given by Lord Steyn in Frost , it seems to me the concept of the immediate aftermath of the incident has to be assessed in a particular factual situation. I am not persuaded that in a situation like the present the parents must come across the abuser or the abused immediately after the sexual incident has terminated. All the incidents here happened in the period of four weeks before the parents learned of them. It might well be that if the matter were investigated in depth a judge would think that the temporal and spatial limitations were not satisfied. On the other hand, he might find that the flexibility to which Lord Scarman referred indicated that the were."

Mr Taylor does not, however, attempt to rely upon W to advance an argument that Mrs White's suicide comes within the "immediate aftermath" of the barrier incident. He concedes, as I have indicated, that it is the suicide and its aftermath upon which his case succeeds or fails.

20. I turn now to the recent case of Walters v North Glamorgan NHS Trust [2002] EWCA Civ 1792 . This was described by Mr Taylor as an important decision and one upon which he placed considerable reliance. Mr Walker on behalf of the respondent described it as the high-water mark of this or any claimant's case. The facts can be briefly stated. The claimant was the mother of a baby born in September 1995. He suffered from acute hepatitis, which the doctors failed to diagnose. Had they done so, a liver transplant may have been performed. In fact the child became increasingly unwell. Ten months later, whilst in hospital and in the mother's presence, he suffered a fit. This led to brain damage and 36 hours later the baby died. The fit and what followed were relied upon as establishing a shocking event or events which resulted directly from the defendant's negligence and which caused the claimant mother, a secondary victim, psychiatric injury. Giving the leading judgment, Ward LJ referred to the "fact and consequence of the defendant's negligence" passage of Lord Wilberforce's speech in McLoughlin . At page 23 Ward LJ said:

> "That passage serves to confirm that the fact and consequence of the defendant's negligence is made up of a series of events. One looks to the totality of the circumstances which bring the claimant into proximity in both time and space to the accident. It seems to me, therefore, to be implicit in his judgment read as a whole that when he said at page 423 `the shock must come through sight or hearing of the event or its immediate aftermath' he was not intending to confine the event to a frozen moment of time."

Further, at paragraph 34 Ward LJ stated:

> "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 define 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 circumstances 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."

21. In Walters the first negligent act, namely the failure to diagnose properly, occurred, as Mr Taylor pointed out, many months before the critical shocking event or events. He reminded the court that it is impossible in many cases to pin-point the moment or moments at which the negligence occurs. But, he submitted, Walters makes it plain that the court should be concentrating on the shocking event, not the negligent event. The only relevance of time in this context, he submitted, is that it might make causation more difficult to establish.

22. Thus, Mr Taylor derived from the case law the following principles as to shocking events:

    (i) a shocking event is not confined to a frozen moment in time;

    (ii) a shocking event may be made up of a number of separate events; and

    (iii) what constitutes a shocking event depends upon the facts and surrounding circumstances of any particular case.

    With those observations Mr Walker agreed.

23. Applying the law as now established to the facts of this case, Mr Taylor argued, leads inexorably to the conclusion that the ultimate shocking event was the suicide since this was the event caused by the respondent which shocked the appellant and led to his injuries. The shocking event, he argued, does not have to be the negligent event (in this case the incident with the barrier) as the District Judge appears to have found. The horrifying event may be the negligent event; it may not. Cases are fact-specific and there is no principle of law which prevents this claim proceeding.

24. On the contrary, Mr Taylor submitted, the law has developed in such a way as to allow a claim of this kind to succeed. It is at least arguable and the court cannot find there is no real prospect of success. The court cannot say the claimant is bound to fail in establishing sufficient legal and factual proximity and that as a fact and consequence of the respondent's negligence the appellant suffered nervous shock.

25. Should the court find that the instant case does not fall within the current criteria for recovery of secondary victims, Mr Taylor reminded me that this is a strike-out application. The common law recognises the need to be flexible in dealing with new situations. As Lord Goff put it in Frost at page 473:

    > "I have referred to the category of secondary victims as identified by Lord Oliver to whom special limiting principles apply. Since, however, this part of the law is still in a state of development, we should not exclude the possibility that other categories of claimant may come to be identified whose ability to claim damages for psychiatric injury should also be limited."

26. In McLoughlin Lord Bridge set out the court's approach to the development of the common law. He described the failure of the courts to consider the extension of the law in this area at that time as "an unwarranted abdication" of the court's function. Whilst it is recognised there are competing policy considerations, the floodgates argument he decided was not applicable.

27. In any event, says Mr Taylor, as Ward LJ said in Walters :

    > "If I had to make the choice between redressing a wrong to an injured claimant and protecting the pocket of negligent defendants for economic reasons, then I would unrepentantly prefer to do justice than to achieve fiscal expediency."

    Mr Taylor submitted that I should adopt the same approach. In the circumstances, he argued, if it is necessary to take an incremental step to allow what he described as a deserving claim to succeed, then I should do so.

28. On behalf of the respondent Mr Walker argued that, whatever criticism is made of the District Judge's reasoning, in any event the appellant's cause of action is unsustainable. The appellant plainly suffered no shock on attending the car park shortly after the accident in June 2000. Clearly he was not concerned at that time. Nor could anybody have foreseen the train of events that unravelled over the next six months. Counsel for the appellant conceded, as he had to, that no claim could have been mounted if Mrs White had merely continued to suffer injuries, mental or physical, after her accident at the car park. Nor could one have been mounted if she had eventually died by reason of physical injury sustained in the accident. In neither case could the appellant have claimed to have been shocked in the legal sense by the sudden appreciation of a horrifying event. Mr Taylor reminded me that, for a large part of the six months that ensued between the accident and Mrs White's suicide, nothing happened which could have caused Mr White to suffer psychiatric injury. Mr White's case is that his injury was caused by the suicide and the events after the suicide.

29. As I have indicated, Mr Walker accepted the propositions advanced by Mr Taylor as to the definition of "shocking event". He further accepted that secondary victims can establish sufficient proximity to an accident by relying upon direct perception of some part of the shocking event or events, which includes the immediate aftermath. But, his position was that the relevant event and aftermath in this case - the potentially shocking event - was the barrier incident. Mr Walker submitted that Mr Taylor's argument in the present case is seeking to circumvent the control mechanisms which require Mr White to establish at law a necessary proximity in time or space to the accident or its immediate aftermath. Mr Taylor is attempting to do that through arguing that the suicide formed part of the shocking event. There was, Mr Walker argued, no inevitability that Mrs White would lose her life by suicide following the defendant's negligent act. There was, in this case, no seamless tale between the two events at six months' distance. Mr Walker reminded me that in McLoughlin, when the House of Lords allowed the mother to recover damages for her nervous shock, Lord Wiberforce stated that to allow her claim would be "upon the margin of what the process of logical progression would allow". He reminded me that in that case there can be no doubt the event was the road traffic accident. The deliberations of their Lordships' House focused on whether or not the two hours following the accident fell within the immediate aftermath of it such that a duty during that period of time was owed to the claimant by the defendant. The fact that during those two hours the claimant's husband and children were broadly in the state produced by the accident was clearly an important consideration: see Lord Jauncey's speech in Alcock at page 423H.

30. Turning to Alcock , Mr Walker reminded me, if I needed reminding, that the shocking event dealt with in Alcock was the crushing of spectators in the Hillsborough Stadium disaster, many of whom died. Again, one of the issues before the court was whether or not the plaintiff's relatives or some of the spectators could establish sufficient proximity in time and space to the event. Of those relatives, Mr Alcock was the first to identify his relative whom he saw in the mortuary some eight hours after the accident. Lord Ackner said:

> "Even if this identification could be described as part of the aftermath, it could not in my judgment be described as part of the immediate aftermath. There was not sufficient proximity in time and space."

Mr Walker further relied upon the following passages of Lord Oliver's speech at pages 416-417:

> "No case prior to the hearing before Hidden J from which these appeals arise has countenanced an award of damages for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the defendant's breach of duty to the primary victim, nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity between the plaintiff and the 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. As I read the evidence, the shock in each case arose not from the original impact of the transmitted image .... These images provided no doubt the matrix for imagined consequences giving rise to great concern and worry, followed by a dawning consciousness over an extended period of time that the imaged consequence had occurred, finally confirmed by news of the death and in some cases visual identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image.
>
> To extend the notion of proximity in cases of immediately created nervous shock to this

> more elongated, and to some extent retrospective, process may seem a logical development. But whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated, I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability."

31. Mr Walker submitted that whilst no precise definition of "immediate aftermath" has been given, each case being dependent on its own circumstances, guidance can be gleaned as to the parameters from the authorities. He accordingly took me to a further authority, Taylorson v Hieldness Produce Limited [1994] PIQR 329 . The claimants there were the parents of a boy who was crushed under a reversing vehicle. The accident was the shocking event and the issue was as to whether or not the claimants could rely upon their experiences, from the time they learnt of the accident to the time when they left hospital after the boy had died, as the immediate aftermath of the accident. The parents were informed of the accident soon afterwards and went straight to the hospital, seeing their son ten hours after the accident. They stayed with him for the ensuing three days whilst attempts were made to save him. He died on the third day. The Court of Appeal concluded that the events complained of by the parents were insufficiently immediate to the accident and that to find liability would create a very considerable extension of the law. It would amount to a further step along a road which would, in the words of Lord Oliver, "ultimately lead to virtually limitless liability".

32. Mr Walker attempted then to distinguish the facts of W in this way. He referred me to the fact that the defendants had specifically been put on notice of the concerns of the foster parents that children should not be put at risk by the presence of a known sex abuser in their home. The parents having failed to detect their children had been sexually abused felt that they were unwilling participants in the breach of duty that resulted in the child abuser being placed with their children. Finally, it would appear that the parents suffered their psychological injuries on discovery of the serious acts of abuse. Thus Mr Walker submits the events here were plainly the sexual assaults. It was decided on the particular facts that it was not unarguable that the defendant did owe a duty of care to the parents and that the immediate aftermath in such circumstances did extend to four weeks after the event. The flexibility shown by the House of Lords is of an entirely different order from that sought by Mr White in this case, says Mr Walker.

33. Similarly, Mr Walker attempted to distinguish Walters v North Glamorgan NHS Trust , a case upon which we spent some time. He conceded that sufficient proximity was found to establish liability but he invited me to consider the way in which the facts were summarised by Clark LJ at page 251:

    > "The very close relationship between the claimant and her son E, the sudden and unexpected shock or series of shocks over a short period and in the presence of the claimant leading to the death of E in her arms."

    There appeared to the court, Mr Walker reminded me, to have been an inexorable progression of events - a seamless tale lasting over a period of 36 hours, that tale being played out in the presence of the claimant, causing a series of sudden assaults on her mind. It is clearly far removed from this case and the incremental step advancing the frontiers of liability that Mr Taylor urges upon the court.

34. Having reviewed the authorities, Mr Walker concluded his submissions by saying that, despite the appellant's argument to the contrary, the shocking event in each of the cases referred to is capable of identification. It is only in Walters that the event was considered to have occurred over an extended period of time and that was only a period of 36 hours. He therefore sought to distinguish Walters from this case.

35. In this case, Mr Walker submitted, the event precipitated by the defendant's admitted negligence was the falling of the barrier which, on the claimant's own case, gave rise to actual injury to Mrs White. She was at that moment clearly a primary victim. That was clearly the shocking event and the suicide did not form part of it. If that is right, the immediate aftermath of the accident of 18 June 2000 cannot encompass the suicide six months later. It is not sufficient for the claimant to rely upon medical evidence to state (a) that there is a causative link between the defendant's negligence and Mrs White's decision six months and several other life events later to take her own life; and (b) that he has suffered psychological injury as a result of his wife's death. What he has to show is that he falls within the control mechanisms set out before and within the margin of what the process of logical progression would allow. Considering the approaches taken to the parameters of immediate aftermath in the case law it is clear, said Mr Walker, that Mr White cannot do so. To entertain the claimant's argument would be to extend legal boundaries too far. The respondent takes particular issue with the suggestion on the

facts of this case as put in the skeleton argument from the claimant:

> "The layman would be understandably bemused if the respondent was able to escape the tragic consequences of its admitted negligence in this case."

Mr Walker reminded me that at the time of the accident the claimant did not suffer any psychological injury. Far from it. Nor did he foresee the deterioration in the mental health of his wife. The passage of six months until his wife tragically took her own life was a significant amount of time. Therefore, Mr Walker argued, a layman would find it difficult to consider that entire period as one seamless tale, and the claimant's injury following the death of his wife one for which the respondent should be held liable. Accordingly, Mr Walker submitted that the learned District Judge came to the right conclusion.

36. I turn to the test to be applied for the purposes of this appeal. It is common ground that the appropriate test to apply on an application to strike out or an appeal of this kind is whether or not the claim has a real prospect of success. The pleaded claim and evidence are taken therefore at their highest and assumed to be true. Mr Taylor argues that either Mr White's case comes within the existing law, or, alternatively, this is a developing area of the law and the power to strike out should therefore be exercised cautiously. The court must be certain that the claim is bound to fail. He referred me to remarks of Lord Slynn at page 662 in W which read:

> "On a strike-out application it is not necessary to decide whether the parents's claim must or should succeed if the facts they allege are proved. On the contrary, it would be wrong to express any view on that matter. The question is whether, if the facts are proved, they must fail. It is not enough to recognise, as I do recognise at this stage, that the parents may have difficulties in establishing their claim."

37. In the limited time available for argument and delivery of this judgment I hope I have done justice to the eloquence and industry of counsel. I can summarise my findings in this way. This is an area of law which has developed over the years and may still be developing, but I accept Mr Walker's arguments that those developments have been carefully controlled by the courts. I am bound by the limitations imposed, as I perceive them to be, as would be any trial judge. I am driven to the conclusion that Mr White, for all his undoubted suffering, does not come within the category of people whose claims the law says should be recognised. Even with the benefit of hindsight his injury was not reasonably foreseeable. He cannot bring himself within the category of people who suffer shock as a result of seeing or hearing a tragic event or its immediate aftermath. This is because in my judgment the relevant event for the purposes of this case is the incident with the barrier.

38. I agree with Mr Walker that one cannot simply ignore the incident in which injury was actually and negligently caused to the primary victim. Mrs White's cause of action based on the respondent's negligence arose at that time. Had Mr White come across the accident and his wife's car and suffered nervous shock as a result, he would no doubt have had a claim. But he did not. It took a second event six months later for that to happen. This was not a combination of circumstances making up one event or even one serious of events of a seamless nature. Nor was there an inexorable progression. The shocking event in this case was a completely distinct event, a second event separated in time and space from the accident.

39. Despite, therefore, Mr Taylor's considerable assistance and eloquence, I can find no support in the authorities before me for the proposition that the duty of care owed by these respondents can arguably stretch to that second event, however shocking it may have been in itself.

40. It follows from what I have said that I do not accept that the decision in Walters extends the law in the way that Mr Taylor might wish. In Walters it is clear from the judgment that the event with which the court was concerned was the fit suffered by the baby and its aftermath. The defendant's negligence caused the fit, which caused the brain damage, which in turn led to the death. Thus the event or series of events began with the fit, "the negligent infliction of damage" and continued "through to the conclusion of its immediate aftermath". That is why there was, as the court found an inexorable progression from fit to death, which occurred in the mother's sight and hearing. It was in that context that the court found the claimant succeeded in bringing herself within the class of people with a legitimate claim in law.

41. As I have indicated, I am not persuaded that Mr White can do the same. He could not have sued for his own personal injury had his wife's health simply deteriorated after the accident. A distraught parent cannot sue for the progressive assaults upon him or her caused by the despair of looking after a brain-

damaged child. Sadly, not all those who suffer can be compensated in damages. It is difficult to see therefore why the law should be extended to cover Mr White's reaction to his wife's death simply because six months after the accident it was for him an undoubtedly shocking event.

42. To accede to Mr Taylor's arguments, as ably as they were expressed, would in my judgment be tantamount to saying that provided a claimant can establish a causal link between their injury and the defendant's negligence then they have a claim. That is not the law and never has been. Mr Taylor must establish on behalf of the claimant a duty of care owed to him by the respondents. He must establish the legal and factual proximity. In my judgment, having reviewed the authorities and reviewed the facts of this case, in that task he is bound to fail.

43. Thus I am driven to the conclusion that the District Judge did reach the right result and this appeal must be dismissed. I appreciate the disappointment that Mr White may feel, but I hope he will understand that I am bound by the law.