Neutral Citation Number: [2019] EWHC 2893 (QB)

Case No: HQ17C03907

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2019

Before :

MASTER COOK

- -

Between :

(1) Mrs Balbir Kaur Paul **(on her own behalf and as Administratrix of the estate of Parminder Singh Paul)** **(2) Saffron Olivia Kaur Paul** **(A child by her litigation friend Mrs Balbir Kaur Paul)** **(3) Mya Paul** **(A child by her litigation friend Mrs Balbir Kaur Paul)**	**Claimants**
- and - **The Royal Wolverhampton NHS Trust**	**Defendant**

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Laura Johnson (instructed by **Shoosmiths LLP**) for the **Claimants**
Charles Bagot QC (instructed by **Brown Jacobson LLP**) for the **Defendant**

Hearing date: 11 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER COOK

MASTER COOK:

1. This is an application by the Defendant made under CPR r 3 and CPR r 24 of the CPR to strike out the claims of the Second and Third Claimants it being alleged that the statement of case discloses no reasonable grounds for bringing the claims or alternatively that the claims have no real prospects of success.

2. The parties are agreed, for the purpose of this application, there is no appreciable difference between the tests under CPR r 3 and CPR r 24. I must be satisfied that the Second and Third Claimants' claims are bound to fail if the Defendant is to succeed on its application, see *Farah v British Airways* [1999] WLUK 155.

3. The Second and Third Defendants' claims are what have come to be known as "secondary victim" claims. They seek damages for psychiatric injury caused by witnessing the death of their father Mr Paul. For present purposes I must take the facts to be those alleged by the Claimants and summarised in Ms Johnson's skeleton argument.

The facts

4. Mr Paul had Type II diabetes and, with this, a number of complications. In 2010 he suffered a transient ischaemic cerebral attack. In 2012 he was noted to have high blood pressure and he developed chronic kidney disease. In November 2012 he was admitted to New Cross Hospital in Wolverhampton as an emergency complaining of chest and jaw pain. He was given treatment for acute coronary syndrome but no cardiac investigations were performed apart from echocardiography. An outpatient exercise test and dobutamine stress echocardiogram were performed. The exercise test was positive but the dobutamine stress echocardiogram was negative, showing normal left ventricular function and no evidence of ischaemia.

5. In June 2013 Mr Paul was placed on dialysis. On 3 August 2013 he was admitted to New Cross Hospital with a two to three-week history of breathlessness. Haemodialysis was commenced on 6 August 2013.

6. On 30 September 2013 Mr Paul was seen by Dr Nicholas, Consultant Nephrologist, who noted he was established on haemodialysis and felt better. Renal transplantation was discussed. Dr Nicholas noted "his ECG does show significant abnormalities, which would be of great concern to the Transplant Surgeons". Mr Paul was referred to Dr Horton, Consultant Cardiologist. He was seen on 9 January 2014 and an elective coronary angiography was recommended. Mr Paul died less than three weeks later when he collapsed in the street when on a shopping trip with his two daughters.

7. It is the Claimants' case that there were failures in the care given to Mr Paul when he was seen at New Cross Hospital for cardiac symptoms in November 2012. Inpatient coronary angiography should have been arranged during this emergency admission. Had this occurred it would almost certainly have demonstrated significant coronary artery disease. It is likely he would have been offered coronary revascularisation. Had coronary revascularisation been performed in 2012 it is unlikely the fatal event in January 2014 would have occurred.

8. What the Claimant's children witnessed is fully set out in the particulars of claim and can be summarised as follows:

    a) Sadly for nine year old Mya she had had a minor argument with her father shortly before he died, so she was walking slightly in front of him. Saffron was walking slightly behind.

    b) Mr Paul said he felt ill.

    c) Mya turned and saw her father lean against the wall momentarily and then his eyes roll back.

    d) Both girls saw him fall backwards and his head hit the floor.

    e) The girls were alone with their father who was unconscious or dead in the street. They were so distressed and frightened they had difficulty calling for help.

    f) Eventually a woman responded to their shouts and called an ambulance.

    g) The girls contacted their mother. They were so distressed that Mya managed to call her mother but could not be understood. 12 year old Saffron broke the news to her mother that her father had collapsed.

    h) Both girls saw a man holding their father's head as he lay on the floor and there was blood on the man's hands from the injury sustained when Mr Paul's head hit the ground.

    i) The girls were taken into a nearby church for a short time because of what they had been witnessing. Whilst they were there their mother arrived and they heard her screams, screaming their father's name.

    j) The girls went back outside and saw their father under a foil blanket receiving chest compressions from paramedics. There was a crowd of people there including the police. They were then taken away to a relative's house.

    k) The timings are: the ambulance arrived at 15.57 and left the scene 30 minutes later at 16.28. Mr Paul arrived at hospital at 16.43 but further resuscitation was felt to be futile and he was declared dead at 16.51.

    l) The children therefore witnessed their father's final event.

9. It is the Claimants' case that Mr Paul's collapse was the first appreciable manifestation of the Defendant's breach of duty (in other words the point at which the damage became evident).

10. The Second and Third Claimant's secondary victim claims were supported by reports from Dr Oppenheim, a consultant psychiatrist, who concluded that they each presented with symptoms of PTSD (ICD10 F43.1) caused by witnessing the events set out above.

The parties' submissions

11. Mr Bagot QC on behalf of the Defendant submitted that the Second and Third Claimants cannot be described as secondary victims because there is no relevant event and no proximity. Putting flesh on the bare bones of this submission he started with Lord Oliver's classic formulation of secondary victim claims in the case of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310;

> "Although it is convenient to describe the plaintiff in such a case as a "secondary" victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him — a duty which depends not only upon the reasonable foreseeability of damage of the type which has in fact occurred to the particular plaintiff but also upon the proximity or directness of the relationship between the plaintiff and the defendant…In the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction. The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J. in the instant case and in which the plaintiff succeeded in establishing liability are, first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim. It must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability on the part of the defendant that in that combination of circumstances there was a real risk of injury of the type sustained by the particular plaintiff as a result of his or her concern for the primary victim."

12. Mr Bagot QC submitted that in the case of secondary victims who sustain psychiatric injury as a result of witnessing death or injury to another, the secondary victim establishes legal proximity and therefore the duty of care owed by a Defendant tortfeasor by satisfying the following "*control mechanisms*":

    a) 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* [1996] AC 155 at [197F]. In addition, there must in fact have been a recognised psychiatric injury suffered.

b) 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 Oliver in *Alcock* [411F]).

c) The Claimant must be in close proximity in space and time to the relevant event (if there is one) or its immediate aftermath: Lord Oliver in *Alcock* [411G].

d) The psychiatric injury must result from a "*sudden and unexpected shock*": Lord Oliver in *Alcock* at [411F]. Lord Ackner in *Alcock* [401F] defined it as: "*(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."* The definition of "shock" has also been clarified in the case of *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] PIQR P20 ("*Ronayne*") where the Court of Appeal underlined that in secondary victim cases, the shock must be shown to be: (a) horrifying; and (b) sudden; but also (c) exceptional [8; 14; 33; 41 per Tomlinson LJ].

e) The psychiatric injury must be caused by the "*sudden and unexpected shock*". Lord Ackner in *Alcock* (400F): "*Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages."* Also, per Lord Oliver in *Alcock* [416G]: "*Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual sensibilities, must be sustained without compensation."*

f) The psychiatric injury must be caused by seeing or hearing the relevant incident or its immediate aftermath, rather than being told about it: Lord Wilberforce in *McLoughlin v. O'Brian* at [422H-423A], as cited with approval, amongst others, by Lord Keith in *Alcock* at [398B].

13. Mr Bagot QC submitted that the Second and Third Claimants' case is unequivocally based on witnessing Mr Paul's collapse from a heart attack, from which he died. There was no suggestion that they witnessed the events during the Deceased's hospital admission between 9 and 12 November 2012 and no suggestion that those events were in any sense shocking in law or caused psychiatric injury. What they did see and rely upon is the heart attack which resulted in their father's death on 26 January 2014, some 14 ½ months later.

14. In the circumstances Mr Bagot QC submitted that the Second and Third Claimants' case cannot be sensibly distinguished from the unsuccessful claim in *Taylor v*

Somerset Health Authority [1993] 4 Med LR 34. *Taylor* was a clinical negligence claim arising out of the failure to diagnose and treat the Claimant's late husband's gradually worsening heart condition which many months later resulted in him suffering a heart attack at work and death in hospital. The Claimant attended the hospital within the hour and was told of her husband's death by a doctor after about 20 minutes. It was admitted that the Claimant suffered nervous shock as a result of what she had seen and heard at the hospital. Auld J held at [267]:

> "There are two notions implicit in this exception cautiously introduced and cautiously continued by the House of Lords. They are of:
>
> (i) an external, traumatic, event caused by the defendant's breach of duty which immediately causes some person injury or death; and
>
> (ii) a perception by the plaintiff of the event as it happens, normally by his presence at the scene, or exposure to the scene and/or to the primary victim so shortly afterwards that the shock of the event as well as of its consequence is brought home to him.
>
> There was no such event here other than the final consequence of Mr Taylor's progressively deteriorating heart condition which the health authority, by its negligence many months before, had failed to arrest. In my judgment, his death at work and the subsequent transference of his body to the hospital where Mrs Taylor was informed of what had happened and where she saw the body do not constitute such an event."

15. Mr Bagot QC pointed out that Auld J's words had been expressly approved by the Court of Appeal in *Taylor v A Novo*, at paragraphs 11 and 33, and that Auld J had expressly rejected the Claimant's argument that,*" the event to which the proximity test applies in the circumstances of this case is the consequence, namely her husband's death from a heart attack, of the health authority's negligence…"* , see p 266.

16. Mr Bagot QC submitted that there are two distinct meanings of proximity, firstly legal proximity (the overall legal test for whether there is a duty of care at all); and secondly physical proximity, as explained by Lord Dyson MR in *Taylor v. A.Novo (UK) Ltd.* [2014] QB 150 at paras. 25 to 27:

> "25. This case does not raise questions of the kind which typically arise in secondary victim cases such as whether the claimant (i) had a close tie of love and affection with the primary victim; or (ii) was close in time and space to the incident for which the defendant was negligently responsible; or (iii) directly perceived the incident rather than, for example, hearing about it from a third person. The issue raised in this case is whether the death of Mrs Taylor was a relevant incident for the purposes of Ms Taylor's claim as a secondary victim. If it was, then her claim would succeed because, on this

> hypothesis, it would not founder on the rock of any of the control mechanisms. ”
>
> 26. I accept the submission of Mr Cory-Wright that, in order to succeed, Ms Taylor must show that there was a relationship of proximity between Novo and herself. The word "proximity" has been used in two distinct senses in the cases. The first is a legal term of great importance in the law of negligence generally. It is used as shorthand for Lord Atkin's famous neighbour principle. Used in this sense, it is a legal concept which is distinct from and narrower than reasonable foreseeability. It describes the relationship between parties which is necessary in order to found a duty of care owed by one to the other. In his speech in *Alcock* Lord Oliver refers to proximity in this sense more than once in the passages which I have cited above. Lord Atkin's neighbour principle itself is concerned with the relationship between parties. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." Lord Bridge made the same point in *Caparo v Dickman* [1990] 2 AC 605 at 617H:
>
> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood'…."
>
> 27. But in secondary victim cases, the word "proximity" is also used in a different sense to mean physical proximity in time and space to an event. Used in this sense, it serves the purpose of being one of the control mechanisms which, as a matter of policy, the law has introduced in order to limit the number of persons who can claim damages for psychiatric injury as secondary victims or to put it in legal terms, to denote whether there is a relationship of proximity between the parties. In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity.

17. Mr Bagot QC submits this is the beginning and end to this claim. There is High Court authority, expressly approved at Court of Appeal level, which demonstrates that these claims are bound to fail for want of proximity.

18. On behalf of the Second and Third Claimants Ms Johnson submits the law concerning secondary victim claims is complex and developing and where this is so, the court cannot be satisfied that the claim is bound to fail, see *Hughes v Colin Richards & Co* [2004] PNLR 35 CA.

19. Ms Johnson points out that cases where the injury arises out of a failure to diagnose and treat an illness pose a particular challenge because they are negligent "omission" cases rather than negligent "act" cases and cases of this sort are rare in the law of tort. The reason why this is relevant to this application is that in conventional personal injury cases there is almost always an "event" of some sort that is the cause of the harm, whether it be a decision to allow an excessively large number of supporters into part of a football ground, driving a vehicle into a collision with another person or causing a stack of racking boards to fall on a co-worker. She points out that in many of the cases the courts have not been grappling with the particular issues that arise in cases of this sort.

20. Ms Johnson accepted that starting point must be the control mechanisms derived from *Alcock*, but maintained the issue between the parties in this application is how those control mechanisms should be interpreted and applied. In particular in the circumstances of this case the questions are whether the children were close to "the incident" in time and space and secondly whether Mr Paul's collapse was sufficiently shocking.

21. Miss Johnson submitted the case of *Taylor v Somerset Health Authority* requires careful consideration. It is one of the oldest of the relevant cases and factually it is far removed from the present case. The claimant's husband suffered a heart attack whilst at work and died shortly after being taken to the defendant's hospital. It is important to note that the claimant did not witness the heart attack or death, but went to the hospital within an hour and was told of his death by a doctor about 20 minutes after her arrival (in other words this is a *McLoughlin* "immediate aftermath extension" case). She was shocked and distressed. She then went to the mortuary and identified her husband's body. The defendant had been treating him for many months and negligently failed to diagnose or treat his serious heart disease. It was admitted that the claimant had suffered nervous shock (ie psychiatric illness) as a result of what she had heard and seen at the hospital. She referred to Auld J's judgment and noted the two bases on which the claim had been argued:

> "first that there was no event on the facts of this case to which the proximity test could be applied. He maintained that the test required some external, traumatic, event in the nature of an accident or violent happening. Here, he said, Mr. Taylor's death long after the negligence which had caused it was the culmination of the natural process of heart disease, and the death, however unexpected and shocking to Mrs. Taylor when she learned of it, was not in itself an event of the kind to which the immediate aftermath extension could be attached."
>
> "Mr. Hart submitted secondly that, if Mr. Taylor's death at work could be considered an event of the kind to which the immediate aftermath extension can be attached, Mrs. Taylor's discovery of it at the hospital from a doctor and subsequent identification of the body did not satisfy the third of the three elements of constraint upon the extension expounded by Lord Wilberforce in *McLoughlin v. O'Brian*, namely as to the means by which the shock is caused. Such means, he submitted,

> lacked the immediacy or directness required to come within that extension."

22. Ms Johnson then referred to the quote at paragraph 14 above. She submitted that it is clear from all the above that the court's analysis of the first issue was tied up with the facts of the case in which Mrs Taylor did not witness the collapse or death of her husband at all. The "shocking event" the court was considering was the entire set of circumstances that led to Mrs Taylor being told of her husband's death sometime after his collapse. The conclusions in respect of the second submission - the "immediate aftermath" extension – are premised on the basis of "even if Mr Taylor's heart attack could be considered to be an event to which the "immediate aftermath extension applied…" and are much fuller.

23. Ms Johnson then referred to the case of S*ion v Hampstead Health Authority* [1994] 5 Med LR 170, which she said was important because it addresses, obiter, issues raised in this case and is one of the few cases in which there is a discussion of the application of the *Alcock* principles to negligent omission cases. It was a strikeout application. A father claimed damages against the defendant health authority in respect of psychiatric illness allegedly caused to him by the negligence of hospital staff in caring for his son. The son was injured in a motorcycle accident. He was taken to hospital and his father stayed with him for 14 days watching him deteriorate, fall into a coma and die. The claim alleged that the son's death was caused by the negligent failure to diagnose internal bleeding. The judge struck the claim out as disclosing no cause of action. Claimant's appeal was dismissed by the Court of Appeal. Staughton LJ held that there was no trace in the plaintiff's medical report that the plaintiff had suffered a shock at all. On an application of *Alcock*, the claim was therefore bound to fail. Waite LJ agreed that the appeal should be dismissed for the reasons stated in the judgments of Staughton and Peter Gibson LJJ. Peter Gibson LJ agreed that the claim was bound to fail because there was no evidence of nervous shock. Nonetheless he also dealt with Defendant's submission that the claim could not succeed because the injuries and/or death of Claimant's son did not qualify as a relevant event for the purposes of a valid secondary victim claim. The Defendant relied on the decision of Auld J in the *Taylor* case. Peter Gibson LJ said that he was not persuaded by this argument. He acknowledged that in most of the decided cases there had been a sudden and violent incident resulting from a breach of duty but he said at p 176, "it is the sudden awareness, violently agitating the mind, of what is occurring or has occurred that is the crucial ingredient of shock". He then said:

> "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."

24. Ms Johnson referred to *W v Essex County Council* [2001] 2 AC 592 to support her submission that the categories of secondary victims are not closed. In this case parents signed an agreement with the council to become foster parents. Following assurances from the council that they would not place a sexual abuser with them and

following a false representation by the council's social worker that G was not a known sexual abuser, they agreed to foster him. The parents later discovered that G had sexually abused their children. They alleged that as a result of the abuse of their children, they had suffered psychiatric illnesses. They commenced proceedings claiming damages in negligence. The judge struck the claim out and the Court of Appeal upheld the decision. The House of Lords allowed the parents' appeal. Lord Slynn of Hadley gave the only substantive speech. He reviewed the leading authorities relating to secondary victims. At p 600B, he noted that in *McLoughlin v O'Brian* [1983] AC 410, 430C–E Lord Scarman recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions and that in this still developing area the courts must proceed incrementally. At p 601A, he said:

> "the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations."

And at p 601:

> "Whilst I accept that 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 the Frost case, it seems to me that the concept of 'the immediate aftermath' of the incident has to be assessed in the 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 they were."

25. Ms Johnson then came to case of *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16; [2003] Lloyd's Rep. Med. 49. This is a case of negligent omission and central to her submissions. The defendant negligently failed to diagnose the claimant's baby as suffering from acute hepatitis. The negligence occurred on or around 17 June 1996 when the baby was noted to be jaundiced and admitted to hospital (para 11). The consequence of that negligence manifested itself some weeks later on 30 July 1996 when the baby had a seizure, from which followed a 36-hour period beginning with the claimant who was sharing a hospital room with her baby, being wakened by the baby having the fit. Misdiagnosis then delayed treatment for brain damage and the facts culminated with the mother being told that the brain damage was severe and agreeing to termination of the baby's life support. The Court of Appeal regarded this as a single horrifying event in which "there was an inexorable progression from the moment when the fit causing the brain damage occurred as a result of the failure of the hospital properly to diagnose and then treat the baby [to] the dreadful climax when the child died in her arms. It is a seamless tale" as a result of which the mother "reeled under successive blows [to her nervous system]".

26. Ms Johnson also referred to the case of *Galli-Atkinson v Seghal* [2003] EWCA Civ 697, in which the Court of Appeal also considered what was meant by appreciation of an "event or its immediate aftermath" At paragraph 25 Latham LJ said:

> "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 the Court in the case of [*Walters*]. Likewise, in my judgment, can the aftermath, provided that the events alleged to constitute the aftermath retain sufficient proximity to the event…"

27. Ms Johnson submitted that in *Walters* the "event" was taken to start with the infliction of *damage*, in other words the first clear *manifestation* of the breach of duty which had occurred some weeks earlier. As Ward LJ said (para 35):

> "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"… It is a useful metaphor or at least a convenient description for the "fact and consequences 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…".

28. Ms Johnson observed that *Walters* has not been the subject of judicial criticism, although it has been distinguished, quite properly, in negligent "act" cases, it remains good law in circumstances such as this case. She also submitted that this analysis in cases where there is a temporal delay between breach of duty and infliction of damage accords with the obiter dicta of Peter Gibson LJ in *Sion* and with the interpretation of the *Alcock* criteria adopted by the Court of Appeal in *Galli-Atkinson*. She submitted that the facts of *Walters* are directly analogous to the facts of the present case.

29. Ms Johnson submitted *Taylor v A Novo* is not authority for the proposition that the "event" must be synchronous with the breach of duty. It addresses an entirely different argument and cites *Taylor v Somerset* with approval in the context of that argument. In *Taylor v A Novo* a negligent act caused injury at the time, but the claimant sought to argue that the relevant "event" for the purposes of the *Alcock* criteria was the death some weeks later.

30. Ms Johnson therefore submitted the Defendant's interpretation of *Taylor v A Novo* would mean that *Walters* cannot have been properly decided. It would also mean that cases of negligent omission could not succeed. This she suggested is obviously wrong.

31. Lastly, and alternatively Ms Johnson submitted that even if the court were to consider there is some merit in the Defendant's application, the lack of clarity over the application of secondary victim criteria in clinical cases and, in particular, those involving negligent omission that gives rise to injury that becomes evident sometime

later, militates in favour of allowing this matter to be dealt with at trial following a full investigation of the facts. She referred to the remarks of Swift J in *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB):

> "208. The early claims by secondary victims mainly concerned accidents, most often road traffic accidents. In those cases, it was comparatively easy to identify the relevant "event" (the accident) although, as the authorities show, it was often more difficult to determine precisely what constituted the "immediate aftermath" of an event.
>
> 209. Cases of clinical negligence present particularly difficult problems. The factual background of cases can be very different and often quite complex. The nature and timing of the "event" to which the breach of duty gives rise will vary from case to case."

Discussion and Decision

32. One cannot have anything but sympathy for the Second and Third Claimants who have undoubtedly witnessed the death of their father in extremely distressing circumstances. But one cannot decide such cases on the basis of sympathy alone, the courts have confined the right of action of secondary victims by means of strict control mechanisms even if the law may appear arbitrary and unsatisfactory, as Lord Dyson MR observed in *Taylor v A Novo:*

> "31. … In *Frost*, the House of Lords recognised that this area of the law is to some extent arbitrary and unsatisfactory. That is why Lord Steyn said "thus far and no further" in *Frost* and Lord Hoffmann and Lord Brown-Wilkinson agreed with him. It is true that the issue in *Frost* was very different from that with which we are concerned in the present case. But that does not detract from the force of the general point that their Lordships were making. In my view, the effect of the judge's approach is potentially to extend the scope of liability to secondary victims considerably further than has been done hitherto. The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament."

33. For the purpose of this application it is accepted by both Mr Bagot QC and Ms Johnson that the Second and Third Claimants will succeed in establishing that they fall within each of the control mechanisms except that of "proximity".

34. I cannot accept Ms Johnson's submission that this is a developing area of the law. I do accept that there is the potential for new circumstances to arise and to which the existing control mechanisms must be applied. However, I do not accept, if it be suggested, that clinical negligence claims involve the application of different principles to other negligence claims, as Ward LJ said in *Walters*:

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

35. The facts of this case are clear. The question is whether the death of Mr Paul is capable of being the relevant "event" for deciding the proximity question. A trial of the facts is not required to enable the court to answer this question.

36. I cannot sensibly distinguish the facts of the current case from those in *Taylor v Somerset Health Authority*. I agree with Mr Bagot QC's submission that the fact the Deceased's wife did not witness her husband's collapse at work but saw his body in the hospital cannot alter the ratio of the case; that his death from a heart attack could not amount to a relevant event for the purpose of the proximity test.

37. The decision in *Taylor v Somerset Health Authority* was expressly approved by the Court of Appeal in *Taylor v A Novo*. Lord Dyson MR said:

> "32. …. A paradigm example of the kind of case in which a claimant can recover damages as a secondary victim is one involving an accident which (i) more or less immediately causes injury or death to a primary victim and (ii) is witnessed by the claimant. In such a case, the relevant event is the accident. It is not a later consequence of the accident. Auld J put the point well in *Taylor* (see para 11 above)."

38. In cases of clinical negligence, it is perhaps more helpful to refer to the "incident" rather than the "accident". However, I accept the submission of Mr Bagot QC that the issue is subject to High Court authority which has been expressly approved at Court of Appeal level.

39. I cannot accept Ms Johnson's submission that the case of *Walters* can be distinguished on its facts. I quote again from Lord Dyson's judgment in *Taylor v A Novo*:

> "35. In *Walters* the court had to decide what was the event for the purposes of establishing a right of action as a secondary victim. The court was able on the facts of that case to hold that the event was a "seamless tale with an obvious beginning and an equally obvious end...played out over a period of 36 hours". It was "one drawn-out experience". I do not see how this sheds any light on the question that arises in this case where the injuries and death suffered by Mrs Taylor were certainly *not* part of a single event or seamless tale."

It is apparent from paragraph 17 of the judgment in *Walters* that the judge at first instance approached the facts in this way:

> "… It seems to me that the period of 36 hours from the moment at which the epileptic fit started, the misdiagnosis by the Prince Charles Hospital, the correct diagnosis by King's College Hospital and the decision to turn off the life support machine because of the irreparable damage caused by the fit can be looked on in law as a horrifying event properly so called."

In other words, the events from the misdiagnosis in *Walters* could be seen as one event connected in space and time. This finding was not challenged in the Court of Appeal.

40. To focus simply on the death of Mr Paul as being the first point at which the consequence of the Defendant's negligence became apparent is not an approach which is supported by the authorities. To do so overlooks entirely that there must be a proximate connection between the initial negligence and the shocking event. It is this proximity in space and time that allowed Lord Oliver to impose the duty of care in *Alcock* and was described by Lord Dyson MR in *Taylor v A Novo* as "*a necessary, but not sufficient, condition of legal proximity"*. It is this proximity which has been found to exist in all successful secondary victim claims including *Walters* and it is the lack of such proximity which explains why the claims in cases such as *Taylor v Somerset Health Authority* and *Taylor v A Novo* failed.

41. In the circumstances the Second and Third Claimants' secondary victim claims are, in my judgment, bound to fail. Mr Paul's tragic death 14 ½ months after the negligent incident, in circumstances separated in space and time from the negligence I must assume occurred in the hospital, cannot possibly be said to be the "relevant event" for deciding the proximity required to establish liability under the established control mechanisms. It follows that the Defendant's application must succeed and the secondary victim claims of the Second and Third Claimants will be struck out. They will of course retain their loss of dependency claims under the Fatal Accidents Act 1976.