PSYCHIATRIC CLAIMS FOLLOWING THE AFTERMATH OF A CRASH

This article reviews the law in relation to recovery for so called ‘nervous shock’ and considers one aspect, which presents particular problems in practice, the concept of the ‘immediate aftermath’ of an accident.

Psychiatric Injury

In any claim for psychiatric injury the claimant must prove that he has suffered a recognised psychiatric injury, e.g. depression, post-traumatic stress disorder or an adjustment disorder, as distinct from mere distress or grief, though a pathological grief reaction may suffice. It is therefore essential to obtain expert evidence at an early stage.

Primary and Secondary Victims

In Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 (the first Hillsborough case), Lord Oliver distinguished between two broad categories of claimant: on the one hand, the claimant who ‘was involved either mediately or immediately, as a participant’ (the ‘primary victim’); on the other, the claimant who ‘was no more than the passive and unwilling witness of injury caused to others’ (the ‘secondary victim’).

In the later case of Page v Smith [1996] AC 155 Lord Lloyd took a narrower view of a primary victim, describing the claimant as a primary victim because he was a ‘participant... directly involved in the accident, and well within the range of foreseeable physical injury’. In White v Chief Constable of South Yorkshire Police [1999] 2 AC 455 (the second Hillsborough case) the majority accepted Lord Lloyd’s approach. The definition suggested in Clerk and Lindsell on Torts neatly encapsulates the concept: a person is a ‘primary victim’ when his or her illness results from ‘the trauma of being endangered or physically injured’.

Page v Smith

In the case of a primary victim the House of Lords in Page held by a majority that foreseeability of physical injury alone is sufficient to ground recovery for psychiatric injury. Actual physical injury is unnecessary. Further, if some physical injury was foreseeable, liability will attach even if the psychiatric injury was not foreseeable: see Simmons v British Steel Plc [2004] UKHL 20 [2004] ICR 585, applying Page. Whether and, if so, for how long Page will remain good law remains to be seen. It has been the subject of a certain about of debate since it was decided and was recently described by Lord Neuberger in Corr v IBC Vehicles Ltd [2008] 2 WLR 499 as ‘a somewhat controversial decision’. Clearly, it is possible that the House of Lords will be invited to review it at some stage.

Secondary Victims

Unlike a primary victim, a secondary victim must prove that psychiatric injury was reasonably foreseeable. Further, in determining whether psychiatric injury was reasonably foreseeable it is assumed that the secondary victim is of normal fortitude, unless the defendant knows of any particular vulnerability. Provided some form of psychiatric injury was foreseeable in a person of normal fortitude however, then by analogy with the decision in Page and/or by virtue of the eggshell skull/personality principle the claimant should recover even if the particular psychiatric injury or the severity of it was not foreseeable.

Criteria for Recovery as a Secondary Victim

In the case of secondary victims, recovery is subject to three further policy criteria or ‘control mechanisms’ laid down in Alcock:

- A close tie of love and affection with the person killed, injured or endangered
- Proximity to the incident in time and space
- Perception by sight or hearing of the incident
often referred to (usually in reverse order) as the requirements of ‘hearness, dearness and nearness’. In addition, the psychiatric injury must be induced, at least in part, by a ‘shock’.

Close Tie of Love and Affection

Parental and spousal relationships have been held (per Lord Ackner in *Alcock*) to give rise to a rebuttable presumption that ‘the love and affection normally associated with persons in those relationships is such that the defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness’. In the case of other relationships proof of the closeness of the relationship is required.

Proximity in Time and Space

The rationale for the proximity requirement was explained by Lord Wilberforce in *McLoughlin v O’Brien* [1983] 1 AC 410 in the following terms: ‘As regards proximity to the accident, it is obvious that this must be close in both time and space. It is after all, the fact and consequence of the defendant’s negligence that must be proved to have caused the “nervous shock”’. The question however remains: how close? In *McLoughlin* it was held that the duty extended to the ‘immediate aftermath’ of the accident (in that case what the claimant saw when she attended the hospital two hours after the accident). However, this is only a partial answer since the question then becomes: what constitutes the immediate aftermath?

Comparison of the application of the proximity requirement in the cases reveals sometimes fine distinctions. However, the facts of cases vary infinitely and apparently small differences may explain why one claimant succeeded and another did not. But in advising a claimant it would be dangerous to rely too heavily on the facts of any given case. Equally, the sensibilities of judges vary and, as in other areas of the law, this too can affect the outcome in a borderline case. None of this makes it easy in any but the most straightforward case to assess the prospects of success.

What Constitutes the Immediate Aftermath?

The immediate aftermath of an accident comprises the events which follow the accident but which are nevertheless so bound up with it that they can be regarded as part of the accident as an ‘entire event’ (to borrow a phrase used in *Benson v Lee* [1972] VR 879 and cited with approval in *McLoughlin*). However, what this may include will vary from case to case and, as Lord Jauncey cautioned in *Alcock*, ‘What constitutes the immediate aftermath of an accident must necessarily depend upon the surrounding circumstances. To essay any comprehensive definition would be a fruitless exercise’.

A case of particular interest in the context of motor accidents is *Galli-Atkinson v Seghal* [2003] EWCA Civ 697 (2003) Lloyd’s Rep Med 285. The claimant went to look for her daughter when she failed to return from a ballet class. On arriving at a police cordon she explained that she was looking for her daughter. She was told that her daughter was dead. She screamed hysterically and collapsed to the ground. The judge found that she was aware of police cars at the scene but not of an ambulance and there was no evidence that she saw anything of the consequences of the accident apart from the tapes forming the cordon. She arrived on the scene 1¼ hours after the accident. She then went to the mortuary where she arrived an hour later. By then she was in denial. Her husband identified their daughter, whereupon the claimant fell to her knees sobbing uncontrollably. She would not be helped to her feet but crawled to where her daughter was lying, pulled herself up and saw her daughter’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 daughter who was cold. The worst injuries were hidden but her daughter’s face and head were disfigured.

The Court of Appeal in *Galli-Atkinson* held:

- That the aftermath of an accident can be made up of a number of components, provided that the events alleged to constitute the aftermath retain sufficient proximity to the event. A similar approach was endorsed (in each case on very different facts) by the Court of Appeal in *North Glamorgan NHS Trust v Ceri Ann Walters* [2002] EWCA Civ 1792 and by the House of Lords in *W & Ors v Essex County Council & Anr* [2001] 2 AC 592;
- That the immediate aftermath extended from the moment of the accident until the moment that the claimant left the mortuary and that the judge had 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’. In Alcock Lord Ackner noted that ‘it is clear from [McLoughlin] that there may be liability where subsequent identification can be regarded as part of the “immediate aftermath” of the accident’;

- That the visit to the mortuary was not merely to identify the body; it was to ‘complete the story’ so far as the claimant was concerned, who did not want to believe that her daughter was dead. In Taylor v. Somerset Health Authority [1993] PIQR 262 it was held that the primary purpose of the visit by the claimant in that case to the mortuary was to assure herself that her husband was dead, that this went to the fact of death not the circumstances in which death occurred, and that in the circumstances of the case it did not come within the immediate aftermath. But in that case the judge also held that there had been no traumatic event to which the ‘immediate aftermath’ extension could attach and emphasised that the deceased’s body bore no marks or signs which would have conjured up the circumstances of his death (a heart attack);

- That if, on the basis of the psychiatric evidence, ‘the whole of the sequence of events’ (including the mortuary visit) played a part in producing the claimant’s psychiatric illness she was entitled to recover. The Court found that it did and she was.

A borderline case that went the other way was Tranmore v T E Scudder Limited (CA unreported, 28 April 1998), in which a father who attended a demolition site two hours after the building, in which his son was working, collapsed failed to recover. On appeal (from the trial of a preliminary issue to determine whether the claimant was owed a duty of care) Roch LJ held that:

‘… the plaintiff was not present at the scene of the accident nor was he more or less in the immediate vicinity. He did not witness the death of or the extreme danger to his son. Nor is this a case where the plaintiff with his own eyes witnessed the injury to and the suffering of the primary victim with whom he has a close relationship of affection. Two hours had passed between the collapse of the building and the plaintiff’s arrival at the site. The combination of these features in my judgment deprives this case of the immediacy required before the necessary proximity can be said to exist. This case is close to but, in my opinion, just beyond the lines drawn by the decided cases… I have not found this an easy case and I have reached this conclusion with some hesitation because it can be said that it requires a distinction be drawn between this case and that of McLoughlin based on the appellant in McLoughlin’s case seeing the injured members of her family and the plaintiff in this case not seeing the body of his son…’

The claimant in Tranmore had seen a pile of rubble under which his son was buried but had only seen his son’s body the following day.

Clerk & Lindsell on Torts notes that Galli-Atkinson represents a less restrictive approach to the concept of the immediate aftermath. And it is probably fair to say that the courts are now prepared to look less strictly at the concept following W & Ors, Ceri Ann Walters and Galli-Atkinson. What Galli-Atkinson shows is that, depending on the facts of the case, the immediate aftermath may be more elastic than was once thought.

Sight or Hearing
The requirement that the claimant perceive the incident directly means that ‘the shock must come through sight or hearing of the event or its immediate aftermath’ (per Lord Wilberforce in McLoughlin). This is unlikely to present much difficulty in the general run of road traffic cases, though it gave rise to considerable debate in the Hillsborough cases as a result of some of the claimants watching the events on television. The same problems could arise in the case of a serious motorway pile-up depicted on television but the chances are perhaps remote.

Shock
Finally, the psychiatric injury must be induced by shock, a process described by Lord Ackner in Alcock as ‘the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind’. The closer in time and space the claimant is to the incident or its aftermath, the easier it is likely to be to satisfy this requirement. However, expert evidence will generally be required to confirm the causal link between the shocking event and the psychiatric injury, in particular if there may be an alternative cause such as grief. In cases of PTSD, the diagnosis may of itself satisfy the requirement, especially if the claimant suffers from flashbacks of the accident scene or hospital. The same cannot however necessarily be said of depression or an adjustment disorder. Provided, however the psychiatric injury was partly caused by shock the claimant will recover even if there were other causes, e.g. being told of the deceased’s death before coming on the aftermath and/or grief: see Vernon v Bosley (No. 1) [1997] 1All ER 577.