Neutral Citation Number: [2014] EWHC 4053 (QB)

Claim No. HQ12X02577

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2014

Before :

MICHAEL KENT QC
(Sitting as a Judge of the High Court)

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Between :

(1) LISA DIANE WILD **(2) IAN DANIEL WILD**	**Claimants**
- and -	
SOUTHEND UNIVERSITY HOSPITAL NHS FOUNDATION TRUST	**Defendant**

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- -

Philippa Whipple QC (instructed by **Gadsby Wicks**) for the **Second Claimant**
Charles Bagot (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: 14, 17 and 18 November 2014

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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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MICHAEL KENT QC

Michael Kent QC :

1. The Claimants Mr. and Mrs Wild were expecting their first child in March 2009. Mrs Wild had been under the care of the antenatal clinic at Southend Hospital managed by the Defendant NHS Foundation Trust. On 20th March 2009, which was the 40 weeks gestation milestone and thus the expected due date for the birth of her child, Mrs Wild had a show of blood and rang the hospital who told her to come in. Accompanied by her husband who had been called back from work, she did so. In an examination room, in circumstances which I will describe in more detail later in this judgment, it was discovered that in fact her baby had died in the womb. After returning home for the night Mr. and Mrs Wild came back the next morning when labour was induced and, after some seven hours, she delivered a still-born child they have named Matthew. The Claimants commenced proceedings against the Defendant alleging negligence in a number of respects in connection with the noting and recording of the baby's rate of growth. They alleged that, but for that negligence, Matthew would probably have been born alive because foetal compromise would have been diagnosed at a sufficiently early date for delivery to have been achieved through induction of labour before his death in utero. I summarise these allegations of negligence and causation because the Defendants have admitted the claim of Mrs Wild and, by a Consent Order dated 10th July 2013, have agreed to pay her the sum of £41,948.64 in settlement of her claim. Breach of the duty of care owed to her causing compensatable loss is thus conceded. Her claim had in fact included a claim for damages for psychological trauma although Mrs Wild had a good cause of action because of the negligence leading to the death of her baby in the womb, whether or not she had suffered additional physical or psychological injury (see *Bagley v. North Herts Health Authority* NLJ 30 July 1986 Simon Brown J).

2. I am concerned only with the claim of the Second Claimant, Mr. Wild, who also claims damages for psychological injury but his claim, if it is to succeed, must navigate its way through the various *"control mechanisms"* which the law has devised to limit claims for *"nervous shock"* in respect of *"secondary victims"*, controls that do not exist in the case of primary victims.

3. There is no issue in this case as to the genuineness of the injury suffered by Mr. Wild, namely a psychological illness or injury which satisfies, by one label or another, the acknowledged works of classification of recognised psychiatric illness. Indeed the quantum of any award of damages properly attributable to such injury is, subject to liability, agreed in the sum of £25,000.

4. The parties have exchanged the reports of psychiatric expert witnesses, Dr. Martin Baggalay on behalf of Mr. Wild and Dr. Richard Latcham on behalf of the Defendant. Those experts have met on two occasions, have identified areas of agreement and have answered specific questions posed by the parties' solicitors. In all essential matters they are agreed and those witnesses have not been called. I will have to look at the precise details of the agreement between the psychiatrists insofar as they relate to the causation of Mr. Wild's illness in order to fit their findings into the legal framework of the *"nervous shock"* cases.

5. The Claimants served witness statements signed by each of them. The Defendants have not challenged any part of their evidence (and have not called any factual evidence of their own). On the application of Miss Whipple QC for the Second

Claimant I permitted Mr. Wild to go further than simply confirming his witness statement in the witness box and allowed him to describe in his own words his experiences over the two days (20th and 21st March 2009) which are at the heart of this case. Mr. Bagot for the Defendant objected to this course but it seemed to me that it was properly within my discretion to allow Mr Wild to describe matters in his own words and it has been of assistance to me although, in the event, he did not say anything inconsistent with or significantly additional to what had been said in his witness statement. Mr. Bagot did not cross-examine. Mrs Wild's witness statement was put in evidence without the need to call her to confirm it on oath.

The facts in more detail

6. Mrs Wild regularly attended her antenatal appointments from the end of 2008 when the midwives, as is normal, recorded the foetus's fundal height so as to plot an antenatal growth chart. Apart from an appointment on 10th January 2009 when they were told that the baby was in the breech position, something confirmed just over three weeks later but which then corrected itself, the Claimants were given no cause for concern at any time. Mrs Wild did have some severe pains and spasms but she was reassured about these as being perfectly normal and the pain eventually disappeared. On 10th March the Claimants (Mr. Wild invariably attended these appointments with his wife) again attended and, as far as they were concerned, everything was proceeding normally. Mrs Wild did mention to a midwife that her baby was not moving much anymore during the day but was told this was normal.

7. On the 20th March she woke at about 8.30am and found spots of blood. She called her mother and Mr. Wild at work. She was developing low back pain. She phoned Southend Hospital who told her she should come in and, after waiting for her husband to get home, they went to the hospital and were taken into an examination room.

8. Mr. Wild described in oral evidence what then happened. He said that he was in something of a panic when his wife had phoned him because as far as he was concerned the baby was coming. He was excited and elated but also terrified that he was going to be a father for the first time. In the examination room a trainee midwife tried to listen to the heartbeat with a handheld scanner but could not find it. That did not ring any alarm bells at that point. The trainee went and got someone else who came in and, using a Doppler scanner, also failed to find a heartbeat. Another person then came in but with a heart monitor and pads which were placed on Mrs Wild but still they could find no heartbeat. Mr. Wild told me that he had no idea what was then going on. His wife was upset and other people were crying including one of the trainee midwives. He did not at first realise what was happening "*but it started to dawn on us that there was a problem"*. He said that when the fifth person arrived with a scanner and said *"I concur"* it was as if he had been slapped across the face. He was shocked, bemused and dumbfounded and did not know what to do. His wife was crying and left the room. No one actually said to him your child has died. Before he heard the words *"I concur"* he was worried. There were then five people in the room, his wife was crying and it was bedlam. The look on his wife's face was then one of utter devastation. He felt numb. He said it had never entered his head that you could turn up on the day your baby was due and something like this could go wrong. He had been there when scans had been taken in the past and had been able to hear the heartbeat. This time nothing could be heard. He realised his wife had left the room and, for reasons he could not explain, he found himself apologising to the staff in the

room and went to find her. She was wandering around trying to find a way out of the hospital. She was hysterical and crying. They both felt they had to get out and they went over the road where Mrs Wild phoned her father and he phoned his mother. It was as he was talking to his mother that it had struck him what had happened. Again he found himself apologising, this time for the fact that his child had died, and it sank in when he said it out loud. His wife was distraught and in tears as he was. His wife's father came and told them they had to go back into the hospital. Mr Wild said he didn't want to do that because then "it's real". They were persuaded to go back in. He found himself overhearing a newly born child crying from an adjoining delivery room. They spoke briefly to the consultant who said to Mrs Wild *"you have to deliver the baby"*. She said *"why?"* and asked if a C-section was possible. The consultant said it was a matter of either staying in that night or coming back in the morning. They opted to go home. Mr Wild said he felt sick about his wife returning to deliver a dead child and he described it as the most awful thing one can go through. They made it through the night hardly sleeping and the next morning arrived back at the hospital at 7.45. Labour was induced and Mrs Wild walked around the hospital grounds. When it came to the time for delivery of the still-born child Mr. Wild was present. He stood to one side and cried and screamed *"no"* repeatedly. His wife was panicking and hysterical but was stronger than him. The midwife took the dead baby out of the room but returned with him and asked if they wanted to hold him. Mr. Wild was utterly repulsed by the idea. He thought it was horrible and did not feel right. However later, after his wife had held the child, he did so. He found the whole thing horrific but he was also *"a little bit so proud"* because Matthew was so real. His parents came in and he held the dead child out to his mother and asked her to *"fix him"* meaning make him live. Mrs Wild's father came in and collapsed to his knees making a primal cry of anguish and sobbing and kissed the baby and that is something Mr. Wild also cannot forget. After a couple of hours they left the hospital with a few of the things intended for Matthew.

9. I accept that account in its essentials. The contemporaneous clinical notes show some minor differences in the details of the attempts to find a heartbeat and it was probably a Dr Gupta who said *"I concur"* but these are of no significance.

The evidence of the psychiatrists

10. Dr. Baggalay's opinion was that Mr. Wild has suffered from pathological grief and the nearest entity in the International Classification of Diseases version 10 (ICD-10) is moderate depressive episode (F32.1). Dr. Latcham agreed with Dr. Baggalay that this was a case of *"abnormal grief"*. Dr. Latcham would prefer to classify it as a case of post traumatic stress disorder. Dr. Baggalay, in his report of 20th September 2012, said that Mr Wild's illness was

> *"caused by the 'nervous shock' of the still-birth of his son Matthew. In my opinion the event causing the shock was the realisation that his son was dead. I am of the opinion that this event started on 20 March 2009 when the attending midwife was unable to find the heartbeat and his wife became tearful and appeared devastated. At this point I am of the opinion that Mr. Wild believed that his son had died. This was subsequently confirmed when he was told that this had happened by the attending clinical team. His knowledge of the death was the*

> *cause of shock to Mr. Wild. It was in my opinion compounded by having to wait and then his wife having to deliver their stillborn son. That is that it was all part of a shocking event that unfolded from 20 to 21 March 2009 as an inexorable progression."*

11. Dr. Latcham in his report of 18th February 2014 said this:

> *"The psychiatric disorder arose from the sudden knowledge of his son's death in utero followed by a period of several hours at home in apprehension at his wife's delivery the following day culminating in the experience of seeing and then holding his dead son".*

12. Dr. Latcham agreed that it was reasonably foreseeable that Mr. Wild would suffer a psychological disorder in the circumstances.

13. In their first joint statement the psychiatrists, having agreed that there is a considerable overlap between their alternative classifications of Mr. Wild's psychological illness as depression on the one hand and PTSD on the other, discussed causation and said:

> *"We agree that the abnormal grief reaction (and depression and/or PTSD) was caused by Mr. Wild witnessing the still-birth of his son Matthew on 21 March 2009."*

14. In a second joint statement answering specific questions raised in an Agenda Dr. Baggalay said that the first event in time which caused or contributed to the development of the psychiatric illness was on the 20th March when the attending midwife was unable to find the heartbeat and Mrs Wild became tearful and appeared devastated. He went on to say that *"the horror of the situation was compounded by having to wait and then his wife having to deliver their stillborn son".*

15. In a letter dated 28th October 2014, in answer to a question from the Defendant's solicitor about paragraph 8 of the second joint statement where he had said that he considered that *"being present at the birth of one's own child not expecting a problem and to come to the realisation that that child is dead, would be considered by the vast majority of people as a sudden and unexpected shock"*, Dr. Baggalay explained that as, on arriving at the hospital on the 20th, Mr. Wild had no reason to believe that his son had died in utero and they were expecting to deliver a live baby *"when it became clear from the reaction of the staff...that there was no heartbeat and the staff concurred that there was no heartbeat, the sudden realisation of the loss and seeing the despair on his wife's face, he experienced what I would describe as a sudden and unexpected shock"*. In a second letter of the same date Dr. Baggalay said that when he said in the first joint statement that *"Mr. Wild's abnormal grief reaction was caused by Mr. Wild witnessing the still-birth of his son Matthew on 21 March 2009"* he meant to say that it was the realisation of Matthew's death on the 20th March that triggered the illness. The events during the rest of 20th March and on 21st March had a compounding effect.

The case for the Second Claimant

16. The Particulars of Claim allege that Mr. Wild is entitled to compensation for his psychiatric injury as a secondary victim within the statements of principle in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310 HL in that he had the necessary close relationship with the First Claimant, he was present at the time of the material events, he suffered a recognised psychiatric illness and the illness was reasonably foreseeable.

17. The Defence denied the Second Claimant's entitlement to damages as a secondary victim and relied in particular on the statement of principle in *Taylor v. A. Novo (UK) Ltd* [2014] QB 150 CA. In particular the Defence avers that the Second Claimant was not present at the time of the alleged negligent events which led to the death of baby Matthew, in the alternative the events were not so exceptional or shocking as to be expected to cause a recognised psychiatric injury. A Reply was served on behalf of the Second Claimant in which the nature of his case was clarified. The averment was that baby Matthew died on a date unknown but at some time after the consultation (at which the Second Claimant was present) on 10th March 2009. His death became known to his parents in traumatic circumstances on 20th March and it is alleged that there was *"an inexorable progression from the moment of the midwife's negligence on 10 March 2009 to the moment that baby Matthew was stillborn"*. It is pleaded that *"*[t]*his is a single event in law, which unfolded over a period of some days"* and *Taylor v. A. Novo* was distinguishable on its facts.

18. In an Amended Reply those details came to be changed and it now became the Second Claimant's case that: "the realisation on 20 March 2009 that Matthew was dead was a shocking event, which violently agitated the Second Claimant's mind and caused him to suffer a recognised psychiatric injury, namely pathological grief and a moderate depressive episode". In place of the alleged inexorable progression from the midwife's negligence on 10th March 2009 the Amended Reply pleads that the starting point for this progression was the moment the Second Claimant became aware that baby Matthew was dead on 20th March.

19. I am of course trying this case on the basis of the Amended Reply for which permission was given but Mr. Bagot points to these changes in the way the case was being put as indicative of some of the difficulties that, in a case of this sort, beset the analysis of the Second Claimant as a secondary victim.

The "primary victim"

20. One of the issues that has been raised in this case relates to the identification of the primary victim (using the classification introduced by Lord Oliver in *Alcock* and approved by the House of Lords in *Page v. Smith* [1995] 1 AC 155). Mrs Wild is identified as the relevant primary victim in the pleadings. The factual case however is based, as has been seen from the conclusions of the psychiatrists, on the Second Claimant's reaction to the death of his son Matthew in the womb and the delivery of a still-born baby on the day following his discovery of that fact. Miss Whipple has taken me to the various authorities that establish that a foetus has no separate legal personality and cannot sue for or recover damages. The law regards the mother and the foetus as one legal person and, in the words of the editors of Grubb and Kennedy Principles of Medical Law (Third edition) paragraph 5.167, *"a court will inevitably*

conclude that one who, in the eyes of the law, has never become a 'person', cannot be said to have obtained life, and therefore cannot be said to have suffered death". Mr. Bagot accepts the latter proposition and builds on it to say that, for that reason, there is no primary victim in this case. That seems a rather surprising conclusion. As I understand it, he takes the position that a father could never succeed in a nervous shock case based upon the still-birth of his child. Mr. Bagot accepts, of course, that the father may, if the facts allow it, succeed in relation to the serious injury and perhaps death or the threatened injury to the mother in connection with the medical emergency which has caused the baby to die in the womb if he was present at the time this happened but that is not the case being advanced here. He says that the Second Claimant's case and the psychiatric opinion are based upon Mr. Wild's reaction to the death of his son, yet Matthew is neither said to be the primary victim nor could he be the primary victim.

21. Miss Whipple's response is to say that one must not confuse legal with factual analysis. As a matter of law there is no distinction between Matthew in the womb and his mother. As a matter of fact, however, the circumstances that gave rise to the psychological injury related to the death of Matthew in the womb but, because he was considered in law part of his mother, Mrs Wild was properly described as the primary victim. The law does not fail to give legal protection to the foetus. A child negligently injured in utero but born alive has a claim for damages (*Burton v Islington Health Authority* [1993] QB 204) and the perpetrator of an assault on a pregnant woman may be convicted of manslaughter if the child is born alive but dies as a result of the injury in the womb: *Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245. Therefore, although the Second Claimant cannot as a matter of law treat Matthew as the primary victim, for the purposes of a claim such as this, his potential for separate existence cannot be ignored either on the facts or as matter of law.

22. I think Miss Whipple is right on this point: in such cases the only proper way to characterise the situation is to say that the mother is the primary victim. She indeed has a claim whether or not she has suffered psychiatric illness as a result of the events leading to the still-birth. Even though the alleged secondary victim's shock-induced psychiatric illness may be more to do with his concern for the unborn child than for the mother, nevertheless his shock is a consequence of the injury or threatened injury to the mother in that her foetus is damaged or destroyed by the relevant negligent act. Therefore I do not accept the proposition (which would create a form of legal *"black hole"*) that a father could never succeed in an *Alcock*-type secondary victim claim in a still-birth case, if it is not accompanied by his witnessing at the same time the actual or threatened death or serious injury to the mother. It seems to me that, because of the treatment of foetus and mother as one legal person, this type of case is analogous to a case such as that of *Froggatt v. Chesterfield & Derbyshire NHS Trust*, (unreported 13 December 2002 Forbes J) where a negligent diagnosis of cancer led to an unnecessary right-sided mastectomy. The operation caused a physical injury to the Claimant's wife just as, by the negligence in this case, the Defendant caused the loss of Mrs Wild's child in utero.

23. One of the questions I will have to consider however is whether *Froggatt*, in which the husband and son obtained damages as secondary victims of the hospital's negligence, would, in the light of recent authority, be decided in the same way today.

The "*control mechanisms*"

24. I have been taken to the leading authorities on *"nervous shock"* cases. As is well known in *Alcock* the House of Lords, in considering the principles laid down in *McLoughlin v. O'Brian* [1983] AC 411, identified *"control mechanisms"* designed to limit the circumstances in which secondary victims might recover damages for psychological injury. It is now very clear that this results in the exclusion of all but a very limited category of secondary victim claimants and this is a policy choice which defines the limits of proximity in law between the negligent Defendant and the secondary victim. It is also now acknowledged that this is bound to operate arbitrarily in excluding from an entitlement to damages people who are not obviously less deserving of compensation than those who can succeed.

25. The control mechanisms are usually put under five heads as discussed by Lord Oliver in *Alcock* at page 411 f-h:

    a) "a marital or parental relationship between the plaintiff and primary victim";

    b) "the injury for which damages were claimed arose from the sudden and unexpected shock to the Plaintiff's nervous system";

    c) the Claimant "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";

    d) "the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim";

    e) "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 close relationship of affection between the Plaintiff and the primary victim."

26. Without all of those elements being present the requirement of legal proximity is not made out. Clearly Mr Wild had the necessary relationship with the primary victim Mrs Wild as discussed above and the causative link between the circumstances said to constitute the shocking event and Mr Wild's illness is not in dispute. The argument in this case has revolved around the third, fourth and fifth requirements. The third requirement rules out shock caused by being told about the event by a third party. Lord Ackner in *Alcock* required the shock to involve *"the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind"* and that has generally been accepted as the correct formulation.

27. Lord Oliver referred in terms to the Claimant being *"personally present at the scene of the accident"* and being in *"physical proximity to the event"*. That has given rise to much of the argument in this case. Miss Whipple points out that as *Alcock* was concerned with physical injuries sustained by the primary victims of the Hillsborough disaster over a relatively brief space of time, the language used by the members of the House of Lords in that case understandably referred to *"the accident"* and *"the event"*. Unless for some unstated reason, which she submitted must be unprincipled, the test for legal proximity always excludes cases where the shock is induced by the

realisation of the terrible consequences for a primary victim of an earlier act of negligence, which may well have amounted to an omission (particularly relevant in clinical negligence cases) the language used in *Alcock* should not stand in the way of suitable adaptation to the facts of such cases as this. She places particular reliance on the approach of the Court of Appeal in *North Glamorgan NHS Trust v. Walters* [2002] EWCA Civ 1792; [2003] PIQR P232 which was a clinical negligence case and in which a mother obtained damages for a pathological grief reaction arising from the death of her 10 month old son which was the result of negligent failure on the part of the medical staff to diagnose acute hepatitis. This was a treatable condition and the death of the baby should have been avoided. The baby had been ill when admitted to hospital where he stayed while certain tests were carried out. He was sent home without the treatment he needed but was brought back by his parents because they remained concerned. His mother stayed in the hospital overnight sleeping in the same room. She woke in the early hours to find that he was suffering a fit. She was with him for the next 36 hours until he died. The Defendants had argued that in those circumstances the Claimant's illness was not a consequence of being present and a witness of *"the fact and consequence of the Defendant's negligence"* (per Lord Wilberforce in *McLoughlin v. O'Brian* at 422 D). Ward LJ in the *Walters* case said that this phrase can cover a series of *"events".* He said at para 23:

> *"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 of its immediate aftermath'.*
>
> *he was not intending to confine 'the event' to a frozen moment of time."*

28. In the course of his judgment Ward LJ referred to an observation in *Sion v. Hampstead Health Authority* [1994] 5 Med LR 170, a case where the secondary victim failed on the evidence to show that his illness was caused by a *"shock"* as defined in the authorities. Peter Gibson LJ said (at page 176):

> *"I can 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 the visiting close relative, wholly unprepared for what has occurred, finds the body and thereby sustains a sudden and unexpected shock to the nervous system."*

29. Ward LJ said at para 34 that the law

> *"[D]oes permit a realistic view being taken from case to case of what constitutes the necessary 'event'. Our task is not to construe the word as if it had appeared in legislation but to gather the sense of the word in order to inform the principle to*

> *be drawn from the various authorities….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."*

30. Ward LJ went on to deal with another objection of the Defendant which was that the rule that a secondary victim cannot recover for injury caused by the shock of being told by a third party of the incident involving the primary victim meant that the Court should not take account of what the mother was being told about her baby's condition from time to time. Ward LJ said,

> *"The distinction in the authorities is between the case where the claim is founded upon 'merely being informed of, or reading, or hearing about the accident' and directly perceiving by sight or sound the relevant events. Information given as the events unfold before one's eyes is part of the circumstances of the case to which the Court is entitled to have regard."*

31. Clarke LJ agreed with this judgment and offered the observation that while "it is too late to go back on the control mechanisms stated in Alcock, I do not think that those mechanisms should be applied too rigidly or mechanistically." He regarded it as still a developing area of the common law and, though he did not think was the decision the Court was taking amounted to "an incremental step advancing the frontiers of liability, if it did, I for my part would take that step on the facts of this case".

32. That authority on its face undoubtedly supports Miss Whipple's argument that one has to apply the rules laid down in authorities mainly concerned with accident cases with some flexibility and creativity when dealing with a case such as this involving clinical negligence leading, after a delay, to the death of a baby in utero. I will have to deal with the issue whether nevertheless *Walters* is distinguishable.

33. As I have said the Defendant founds its principal objection on the basis of the more recent decision of the Court of Appeal in *Taylor v. A Novo (UK) Ltd*. That was not a clinical negligence case. The claimant's mother, having been injured in an accident at work but after apparently making a good recovery, collapsed and died in front of the claimant as a result of an embolism traceable to the original accident. The Court of Appeal considered a number of authorities including *North Glamorgan v. Walters*. The argument for the Defendants was that there was a lack of *"the requirements of immediacy, closeness of time and space, and direct visual or aural perception"* of the shocking events as required by *Alcock*. If the Claimant had been present at the time of the original accident the necessary legal proximity would have been established but it cannot be founded upon events some three weeks later which were a consequence of the original accident not the *"accident"* itself. The Claimant's Counsel had argued

that the authorities, in particular the *Walters* case, show that the primary and secondary victims' causes of action do not have to arise simultaneously.

34. Although *Taylor v. A Novo* was not a clinical negligence case it is clear that the Court of Appeal had in mind the principles applicable to all cases. In particular they paid attention to a decision of Auld J in *Taylor v. Somerset Health Authority* [1993] PIQR P262, which was a clinical negligence case where the primary victim's cause of action would have arisen before the events which led to the shock suffered by his wife (the plaintiff) when he collapsed and died from what had been a treatable heart condition. Auld J had held that the death was the final consequence of negligence. He noted that the *"immediate aftermath"* extension had been introduced as an exception to the general principle in accident cases that the plaintiff could only recover damages for psychiatric injury where the accident and the primary victim's injury or death caused by it occurred within the secondary victim's sight or hearing. Auld J said at P267 that it is implicit in the requirement in the control mechanisms laid down by the House of Lords that there must be:

> *"(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".*

35. Miss Whipple has argued that the effect of *Taylor v. A Novo* cannot be that there can be no claim in a case where the first manifestation of the injuries sustained by the primary victim occurs in front of (or within sight or hearing of) the secondary victim (or where he comes across the primary victim in the immediate aftermath of this injury) but is separated in time from the act or omission constituting negligence. She says that would be an unprincipled distinction imposing an additional control mechanism not intended by the House of Lords in the leading cases. She says that *Taylor v. Somerset* was rightly decided because the plaintiff was not present when her husband collapsed. It was a case where she was told of his death and saw him in the hospital mortuary. For those reasons there was an absence of the physical proximity to the relevant event. However, she says that it should not be read (and if it is so read the decision should not be followed) as requiring such a claim to be refused even if the secondary victim had been present. She says that the requirement of shock from an *"external"* event imports a requirement that the event was capable of being seen or heard or otherwise experienced by the secondary victim. In the case of *Taylor v. A Novo* the mother was injured by the collapse of racking boards at work and that was an incident that was capable of being witnessed. In contrast, in many cases of clinical negligence and in particular of cases such as these where the survival of a foetus is compromised by acts or omissions by clinical staff, there is no *"external"* event. She submits therefore that in such circumstances it is the first manifestation of the injury consequential on the negligence which provides the event which, if it is sufficiently shocking and is seen, heard or otherwise directly experienced by the secondary victim, can support a claim for nervous shock damages. She says that she is not arguing that this is a case where the Second Claimant suffered shock during the

"immediate aftermath" of the relevant event. She says what he experienced on 20th and 21st March *was* the relevant event.

36. Miss Whipple submits that the Court of Appeal in *Taylor v. A Novo* did not intend to state any new principle and, importantly, their reference to the *Walters* case (which was of course binding authority) and which was a clinical negligence case where there were delayed consequences, shows that no such limitation was intended to have been identified in the authorities discussed in the judgment of Lord Dyson MR with which the other members of the Court agreed.

37. My difficulty about that proposition is that not only was there discussion in argument about clinical negligence cases but the contents of paragraph 32 of the Master of the Rolls' judgment approving the way the matter was put by Auld J in the *Taylor v. Somerset Health Authority* case, shows that the principles identified were not confined to conventional *"accident"* cases. It is true that in that paragraph the Master of the Rolls says: *"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".* He says *"in such a case, the relevant event is the accident. It is not a later consequence of the accident".* However, he then goes on to refer with approval to what Auld J said in the *Taylor v Somerset* case as quoted in paragraph 11 of the Master of the Rolls' judgment, a quotation which included:

> *"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 paragraph 33 of the Master of the Rolls' judgment in *Taylor v A Novo* there is this:

> *"It follows from what I have said that in my view the reasoning of Auld J in the Taylor case was correct. As I have explained at para 13 above, the observations of Peter Gibson LJ in Sion v. Hampstead Health Authority [1994] 5 Med LR 170 were obiter dicta and they are therefore not binding on this court".*

38. That is a reference to the observation of Peter Gibson LJ that, where a primary victim had been negligently given the wrong medicine, the secondary victim might be able to recover damages for nervous shock if he unexpectedly came across the body of the primary victim in the hospital room. Miss Whipple says that the Master of the Rolls was merely pointing out what is obviously correct namely that this part of Peter Gibson LJ's judgment was obiter. It seems to me however that it is clear the Master of the Rolls was going further and saying that he could not support that approach as it was contrary to the reasoning in *Taylor v. Somerset* which was considered to be correct.

39. In my judgment the use of the expression *"external event"* in the authorities is explained by the context of these claims which is that they are all made by those who are not directly participating in the events which have engulfed the primary victims and which are in that sense external to the claimant.

40. That then leaves a problem as to how one squares *Taylor v. A Novo* with the *Walters* case. The answer given by the Master of the Rolls is this (paragraph 35):

> *"In the Walters case 2003 PIQR P232 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."*

41. *Walters* was therefore distinguished. However Miss Whipple points out that it was not so easy, if Mr. Bagot's analysis of the *Taylor v. A Novo* case is correct, to distinguish *Walters* because on the facts of that case the baby had already suffered injury as a result of the negligence of the hospital in the form of the continued deterioration in his condition which led the parents to take him back to hospital some time before the fit which occurred in the presence of his mother. It was the fit that was identified by Ward LJ as the *"obvious beginning"* of the *"seamless tale"* yet the hospital's negligence must already have caused damage to the baby. The answer given by Mr. Bagot is that the point taken in *Taylor v. A Novo*, namely that the shocking event in that case was a late consequence of a negligent omission which had already caused damage to the primary victim, was simply not taken by the Defendant in *Walters*. Everybody therefore proceeded on the basis that primary victim's injury was first caused when he suffered the fit.

42. I should say that Mr. Bagot also argued, relying on Lord Wilberforce's reference to the *"fact and consequence of the negligence"* that not only the first consequence for the primary victim but the negligence itself must be synchronous with the sustaining of shock by the secondary victim. That arguably is going too far and is in any event unnecessary if he is right in saying that later consequences of the first injury will not qualify for these purposes.

43. It does seem a little unlikely that the point about the baby in *Walters* having already been damaged and therefore having an accrued cause of action was overlooked. But it may be that this was a treatable condition which could effectively be ignored in a history where the main insult and the inevitability of death was the result of brain damage caused by the seizure. Thus the fit could be treated as the beginning of the relevant "event".

44. I may not have to resolve this issue if the next objection relied upon by Mr. Bagot is right. He says that, however it is characterised, this is a case where Mr. Wild's shock, which generated his psychiatric illness, was a consequence of his realisation that his son had died. What *Taylor v. A Novo* tells us is that, however arbitrary and illogical it may be, there will be plenty of apparently deserving claimants whose cases cannot succeed and that will include those where there is no shocking event to witness, only the shocking fact to experience of the death of a loved one or, in this case, the death of the soon to be born baby.

45. Mr Bagot submits that the fact that Mr Wild was not simply told by the medical staff that Matthew had died does not alter the position. Just as, in the ***Alcock*** case itself, the viewing of distressing scenes watched on a live television broadcast of the unfolding events in the Hillsborough Stadium did not qualify as being within sight or sound of a horrific event causing injury, death or threatened injury to a loved one, so Mr. Bagot says the realisation from the actions of the staff in the examination room and the failure of the scanner and monitor to detect a heartbeat, does not qualify as the observation by the Second Claimant of a horrific event. Mr Bagot says that as in fact the baby had already died, by definition Mr. Wild was not a witness of the injury and death suffered by Matthew. Even if the injury is characterised, as a matter of law, as having been suffered by Mrs Wild, that was an injury that had already occurred at some time between the 10th and 20th March.

46. In ***Alcock*** the reason why the simultaneous television broadcast did not qualify as being within sight and sound of the horrifying event was that broadcasters complied with (and could be expected to comply with) a code which meant that suffering of identifiable individuals would not be shown. The point was therefore made that what those watching the broadcast, who were concerned that their loved ones were or might have been in the pens where the tragedy was unfolding, were experiencing was not actual sight or sound of the injury and death of the primary victims but a real and distressing anxiety about whether they were involved. They discovered some time later that indeed they had been but the discovery and the visit to the mortuary was not sufficiently close in time to count as part of the *"immediate aftermath"*.

47. In my view this provides an analogy with this case: Mr. Wild was experiencing a growing and acute anxiety which started when the second midwife failed to find a heartbeat. This developed to the point at which, simply because of the behaviour (and no doubt body language) of the clinical staff and the words of the doctor *"I concur",* he had a correct realisation that the baby had died. But none of that, in my judgment, equates to actually witnessing horrific events leading to a death or serious injury. That what Mr. Wild experienced was capable of and did generate sufficient shock to have foreseeably caused psychiatric illness is not in dispute. But the authorities show that the control mechanisms often have the effect of excluding such cases.

48. Is ***Walters*** distinguishable from this case? Mr. Bagot points out that the shock in that case, although prolonged over 36 hours, did not start, as in this case by (as he puts it) the realisation of the death of the child. It started with the manifestation of the very serious condition of the baby and continued with various highs and lows until he died 36 hours later in the claimant's arms. Miss Whipple says that that is not a relevant distinction: it does not matter what the sequence is. In this case, although Matthew had already died when the awful reality dawned on Mr. and Mrs Wild on the 20th March, the agony was not over for them in that they both had to wait until the next day until the still-birth.

49. It has also been objected that the effect of the control mechanisms, if they are as rigid as the Defendants say they are, is to give rise to and perpetuate a distinction between different classes of claimant which will create an understandable sense of grievance even beyond the effects of the arbitrary distinction between those who experience an event and those who are merely told about the consequences of an event (who are already excluded). Miss Whipple points out that, for example, Mr. Wild would not then be able to recover in circumstances where his wife has recovered damages for

distress arising out virtually the same set of circumstances. That imports a gender bias as fathers would never be able to recover in still-birth cases whatever the facts may show. She suggests that it also draws an arbitrary distinction between accident cases (meaning cases such as road accidents where the negligence and consequences are all played out at the same time in front of the secondary victim) and clinical negligence or disease cases where the effects of acts or omissions may become manifest (and only be capable of becoming manifest) some time (perhaps many years) later.

50. However, given the acceptance that there is an arbitrary line drawn between classes of claimant in these cases, it does not seem to me that the fact that cases similar to the one before me might never be able to succeed can be a ground for extending or modifying the control mechanisms in nervous shock cases, particularly when the subject has been so comprehensively travelled over by the higher courts.

51. I referred to the case of ***Froggatt*** as being one which might provide an analogy with this case. The point was that, although Matthew had already died, that was not the end of the story because Mrs Wild was not simply the primary victim as a matter of law she was in fact a victim and remained a victim for whom the physical consequences of the negligence remained at least up to the moment when she gave birth to still-born Matthew on 21st March. ***Froggatt*** does seem to be a difficult case in any event because the injury (the mastectomy) was caused some time before the shock that Mrs Froggatt's husband suffered when he saw her undressed for the first time after the operation. That was not, therefore, even a case such as ***Taylor v. A Novo*** where there was a later deterioration in the condition of the primary victim. She was recovering from the effects of the operation and her husband's shock was merely at seeing some time later how badly she had been disfigured. It seems to me that had *Froggatt* been cited in ***Taylor v. A Novo*** (it was not apparently) the Master of the Rolls would have been likely to comment that it was not supported by the authorities. Damages were also awarded to Mrs Froggatt's son who overheard a conversation she had with her medical advisor and realised that she had been diagnosed with cancer. That was before the operation and there may be different considerations in place there but even that seems to be difficult to reconcile with the need for the secondary victim to witness an external shocking event causing injury to the primary victim.

52. Counsel have identified two *"nervous shock"* cases involving still-births: ***Tan v East London and City Health Authority*** [1999] Lloyd's Rep (Med) 389 and ***Less v Hussain*** [2012] EWHC 3513 (QB) both of which failed. I accept they are potentially distinguishable on their facts from this case and both pre-dated ***Taylor v A Novo*** (the first also predated ***Walters***). I was also referred to ***Tredget v Bexley Health Authority*** [1994] 5 Med LR 178, a case of a brief survival after birth, where a father recovered damages as secondary victim. However, that is distinguishable not only because the baby was born alive but because the negligence which inflicted ultimately fatal injuries on the baby took place during labour in front of the father in circumstances described as *"chaos"* and *"pandemonium"* in the delivery room.

Conclusion

53. In my judgment this case is materially different from the facts in *Walters* being based on an "event" which starts with the realisation that Matthew has already died. The authorities have driven me to conclude with reluctance that Mr Wild cannot on the

facts succeed in his claim for damages which must therefore be dismissed. It would be difficult to argue that that is a logical outcome but, as Lord Oliver said in ***Alcock*** at page 417 in relation to the submission that a visit to the mortuary several hours after the tragedy should be treated as part of the immediate aftermath: *"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 analogical development. But … the law in this area is not wholly logical."* The same may be said about an extension to a clinical negligence case where the first possible manifestation of the consequences is when medical staff discover that the baby has already died in the womb.

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