

**VICTIMS OF CIRCUMSTANCE**

**Rescuers, secondary victims, and the need for Law Reform**

In recent months, the tragic events which occurred in both London and Manchester have reignited the debate about the impact of austerity on our public, security and emergency services. It has also highlighted the role and importance of our communities in responding to the consequences of such tragedies. This in turn, has raised questions as to where the law of personal injury stands in assisting members of these communities and the families of victims who suffer psychiatric injury as a result of the events they are exposed to. It is a difficult discussion and debate to engage in and one where public policy and justice seem to collide, but it is a debate that cannot be avoided and must be addressed to avoid potential injustice.

**Victims of circumstance**

Within a personal injury context, where a person is directly physically injured as a result of a disaster, such as being caught in a collapsing building or on a sinking vessel, the law is quite clear as to that person’s ability to bring a claim for personal injury, assuming that an actionable cause of action against a defendant can be identified.

But what about the people caught up in the periphery of these events who are not physically injured, but suffer psychiatric injury as a result of their experiences, where are they left? Considering this question two main classes of potential claimant emerge. Firstly, the rescuer who goes to the aid of victims of a disaster and in doing so is exposed to danger or reasonably believed that they were in danger but who suffer no physical injury. Secondly, secondary victims, these being individuals who are not directly exposed to danger but suffer a psychiatric injury on perceiving or learning of the injury or death of loved ones.

**Rescuers**

As a class of claimants rescuers can be defined as persons who come upon the scene of a shocking event, and become involved in helping the victims of that event. It does not take a significant mental leap to see how these individuals could suffer from psychiatric injury through their selfless actions. Within a personal injury context, rescuers do not have to be a member of an emergency service (such persons having additional potential causes of action in breach of statutory duty and contract against their employer), but can be and often are brave members of the public doing their best to save lives. Whilst there is no general common law duty placed on an individual in England and Wales to rescue another person, as set out by Lord Steyn in **White v Chief Constable of South Yorkshire** [1999] 2 A.C. 455 “*the law has long recognised the moral imperative of encouraging citizens to rescue persons in peril. Those who altruistically expose themselves to danger in an emergency to save others are favoured by the law*.”

Legally, the status of a rescuer was first addressed in **Chadwick v British Railways Board** [1967] 1 WLR 912. In this matter, the Claimant who lived some 200 yards from the site of a train crash in Lewisham in which 90 people died, and many more were injured, spent many hours of the night crawling under the wreckage to help and comfort the victims of the crash and consequentially developed a psychiatric injury due to his experiences. Later, following the Hillsborough disaster, the House of Lords, in the already referenced Judgment of Lord Steyn in **White** went on to provide that “*in order to recover compensation for pure psychiatric harm as rescuer it is not necessary to establish that his psychiatric condition was caused by the perception of personal danger… But in order to contain the concept of rescuer in reasonable bounds for the purposes of the recovery of compensation for pure psychiatric harm the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so. Without such limitation, one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover…* [but] *ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover*”.

This principal was summarised perhaps more briskly by Mr Leggatt QC at paragraph 23 of **Monk v PC Harrington Ltd** [2008] EWHC 1879 (QB)) who identified that a rescuer must establish that firstly, they provided more than “*trivial or peripheral assistance*”, and secondly that they exposed themselves to danger, or reasonably believed that they were doing so in going to the rescue of injured persons. If these criteria are met, then the rescuer establishes the requisite components of foreseeability, proximity and duty of care. However, the rescuer would still need to satisfy the Court of an act of negligence and causation of a recognisable psychiatric injury flowing from this, but in principal if this can be done the case should succeed.

However, it can be argued that inequitably, rescuers who come to a scene of a disaster where the immediate risk of danger has passed or they are situated outside of a danger zone cannot successfully pursue claims as rescuers for nervous shock and consequential psychiatric injuries, caused through the trauma of being involved in the aftermath of a disaster. At present, unless a rescuer actively perceives they are being exposed to danger caused through an act of negligence (for example rushing into a collapsing building to save people trapped therein) then the claim on balance, will fail. Juxtapose this to cases where there is no subjective risk to a claimant, for example the same rescuer providing first aid to a seriously injured person who has been pulled from the same building, such as seeking to staunch the bleeding from a severed limb, but does so at a safe distance. They are not able to say they believed they were in danger, and therefore cannot recover damages as a rescuer despite their actions being just as meritorious in the sense of the preservation of life. Whilst there is a factual distinction between a rescuer removing someone from a dangerous situation, the provision of effective and immediate first aid is surely not less meritorious? At present this second class of person would appear to be actually secondary victims, and due to the **Alcock** control mechanisms would be very unlikely, if not unable to bring successful claims.

Has the time not come to reassess this distinction and potentially broaden this class of claimants, but on a case by case basis focusing on the level of care and assistance provided by the rescuer as opposed to using the actual or perceived threat of the proximity of danger to restrict this class of claimant?

**Secondary victims**

A secondary victim is a person who whilst not being personally in danger, suffers psychiatric injury through the perception of, or the hearing of the death or injury to another. The nervous shock must be sudden and has been defined as a “*sudden appreciation by sight or sound of a horrifying event or its immediate aftermath*”. The current law on secondary victims developed following the Hillsborough Disaster through the case of **Alcock v Chief Constable of South Yorkshire Police** [1991] UKHL 5. Due to reasons of public policy, the House of Lords introduced a number of control mechanisms that were designed to allow relatives who suffered injury as a result of seeing their close relatives being injured in the stadium to recover damages, whilst those who watched the incident unfold on TV were not entitled to compensation. The House of Lords considered that to allow the recovery of damages, the relative must have and be capable of evidencing “*close ties of love and affection*” with the primary victim. Furthermore, the Claimant must be “*close in time and proximity*” to the negligence or its immediate aftermath, and the psychiatric injury must arise as a result of a “*sudden appreciation by sight or sound of a shocking event*.”

However, in the modern world and in the context of an unfolding disaster such as a collapsing factory, or a sinking vessel, it is entirely possible for a person who holds sufficient ties of love and affection to a primary victim to learn of the unfolding disaster through technology and social media whilst many miles away. They may on learning of the disaster rush to the scene, but due to geography it may be hours till they arrive, whilst through technology they are continuously saturated and aware of the unfolding events through videos, pictures, and live accounts (albeit remotely). On their arrival at the scene of a disaster, or at a hospital, they then learn that their loved one has suffered serious injury or died, and they in turn suffer psychiatric injury as a result of this shock.

One of the most directly relevant cases in dealing with such hypothetical circumstances is a pre **Alcock** case, that of **McLoughlin v O'Brian** [1983] 1 A.C. 410 where the House of Lords extended liability for nervous shock to all cases where it was reasonably foreseeable that a claimant would suffer injury, irrespective of any limitations of time and space. Lord Wilberforce held that “*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." Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the "aftermath" doctrine one who, from close proximity, comes very soon upon the scene should not be excluded*”. The Courts over time have proved flexible as to the concept of “*proximity in time and space*” in certain (and often meritorious) circumstances through an analysis of the factual circumstances in which a secondary victim finds themselves in, but this has very much been on a case by case basis (for example, **Atkinson v Seghal** [2003] EWCA Civ 697 and **Jones v Ramshaw**[2011] Unreported 5th September 2011).

However, how should the law react in cases where a secondary victim doesn’t learn of the fate of their loved one for days but is in communication with the authorities who make them aware of the increasing probability of their death? Further, how should the law react to cases where such secondary victims view their injured loved ones in hospital but are told by doctors of their condition beforehand following travel to the hospital, and due to the general news coverage of a disaster have an idea of what to expect? Finally, what of cases where such secondary victims witness a deterioration in their loved one’s condition in hospital leading to their death over an extended period of period of time? At present, it appears that the Courts may not support such secondary victim claims unless factually, the entirety of the events experienced can be seen as an “*uninterrupted sequence of events*”, since these claimants would struggle to identify practically the necessary component of a sudden shock as being causative of any psychiatric injury (as per  **North Glamorgan NHS Trust v Walters** [2002] EWCA Civ 1792 **Taylor v Novo (UK) Limited** [2013] EWCA Civ 194 **Tomlinson in Liverpool Women's Hospital NHS Foundation Trust v Ronayne** [2015] EWCA Civ 588 and **Shorter v Surrey and Sussex Healthcare NHS Trust** [2015] EWHC 614 (QB)). This distinction is arbitrary and requires at the very least, to be reconsidered as a matter of public policy.

**Law Reform**

While Lord Steyn in **White** stated that “*it must be left to Parliament to undertake the task of radical law reform*” when dealing with such claims it may surprise practitioners that as far back as 1998, nearly two decades ago, the Law Commission in paper 249 (“*Liability for Psychiatric Illness*”) foresaw the above problems and advised legal reform. Quite powerfully (at paragraph 6.10), in relation to secondary victims, nothing short of legislative reform was advised. It was the Law Commission’s opinion that “*there should be legislation laying down that a plaintiff, who suffers a reasonably foreseeable recognisable psychiatric illness as a result of the death, injury or imperilment of a person with whom he or she has a close tie of love and affection, should be entitled to recover damages from the negligent defendant in respect of that illness, regardless of the plaintiff’s closeness (in time and space) to the accident or its aftermath or the means by which the plaintiff learns of it*”.

The report powerfully expressed the view that “*the imposition of all three* ***[Alcock]*** *proximity requirements is unduly restrictive, and that it is the last two limitations that have resulted in the most arbitrary decisions. How many hours after the accident the mother of an injured child manages to reach the hospital should not be the decisive factor in deciding whether the defendant may be liable for the mother’s consequential psychiatric illness… Provided that the requirement for a close tie of love and affection between the plaintiff and the immediate victim is retained, the main floodgates objection of the possibility of many claims arising from a single event is limited*”.

With regards to rescuers, no legislation was recommended but the report was concerned by Judgments that suggested a claimant would only qualify as a rescuer if he had come within the area of potential physical danger (those cases being **McFarlane v EE Caledonia Ltd** [1994] 2 All ER 1 and **Hegarty v EE Caledonia Ltd** [1997] 2 Lloyd’s Rep 259). Whilst the Law Commission did not endorse it, is it not time to at least consider if people who provide more than “*trivial or peripheral assistance*” in the wake of a disaster should also be classed as rescuers in a new, and wider concept of this class of claimants?

**Conclusion**

History has shown us that the Law often only develops in a reactionary manner and it takes either a great injustice, or a great tragedy to bring this about. Whilst in any disaster, the most important objectives are ensuring it never occurs again, and holding those responsible to account, the scope of the law in addressing a negligent party’s liability to potential claimants must not be artificially restrained so as to render a genuinely injured claimant as nothing more than collateral damage for reasons of public policy.

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