HOW BAD LAW MAKES HARD CASES: A NOTE ON
TAYLOR V A NOVO

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INTRODUCTION

The facts of Taylor v A. Novo (UK) Ltd\(^1\) are as follows: On 27 February 2008, Cindy Taylor (primary victim) was injured in a work accident caused by the negligence of her employer “Novo” (defendant). As a result of this accident, Cindy Taylor sustained injuries to her head and left foot. She appeared to make a good recovery. However, on 19 March 2008, due to deep vein thrombosis and consequent pulmonary emboli, which themselves were consequences of the injury sustained in the work accident, she suddenly collapsed and died at home. Cindy Taylor’s daughter, Crystal Taylor (secondary victim), who had not witnessed the work accident, witnessed her mother’s collapse and death and suffered post-traumatic stress disorder.

Crystal Taylor had brought a claim against Novo for damages for the psychiatric harm she sustained as a secondary victim of Novo’s negligence. The trial judge allowed the claim, holding that all the relevant criteria\(^2\) were satisfied since the operative “event” was the collapse, not the original accident, and the fact that Novo’s negligence caused both the accident and collapse was irrelevant to the collapse being the operative “event”\(^3\).

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\(^1\) Taylor v A Novo (UK) Ltd, [2013] 3 WLR 989 (EWCA Civ 2013).
\(^2\) Ibid. at [2].
\(^3\) Ibid. at [19].
The Court of Appeal allowed the appeal, thus overturning the trial judge’s decision\(^4\). The sole judgment, given by Lord Dyson MR, was based on the following reasoning:

1) Based on dicta by Lord Steyn in *Frost*\(^5\), this area of law should not be developed any further by the courts\(^6\).
2) With regards to the criteria for this claim, the relevant “event” is the accident, not the collapse\(^7\), and the relevant criteria within the current law cannot be stretched so far as to include this event\(^8\).

This case note will focus on the first premise of this argument. It will argue that (1) on the facts of this particular case, it is doubtful whether Lord Steyn’s dicta really prevent the finding of a duty of care on part of Novo; and (2) more generally, that Lord Steyn’s dicta should be rejected or, at least, revisited.

1. **THE LIMITS CREATED BY LORD STEYN’S DICTA**

   This section will argue (1) that Lord Steyn’s dicta restrict the development of new *legal categories*, rather than the accommodation of new *factual scenarios* within existing legal categories; and (2) that the trial judge’s decision in *Taylor v A Novo*...
represents an instance of the latter which means that it is permissible and, thus, that Lord Dyson MR’s reasoning is flawed.

Lord Dyson MR relied on a dictum by Lord Steyn in *Frost* to the effect that the law in the area of liability for psychiatric harm sustained by secondary victims should not be further developed by analogy and incrementalism (“thus far and no further”)⁹.

However, while Lord Steyn appeared to regard the legal categories, or “tests”, within this area of law as settled, he seemed to allow for development of the law through accommodation of new factual scenarios, e.g. if developments in scientific knowledge command it.¹⁰ He stated that “courts of law must act on the best medical insight of the day”¹¹ and, in a different case, he said that it is “an uncontroversial point” that courts “cannot ignore advances” in this respect¹².

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⁹ Ibid. at [31] and [24].

¹⁰ White and Others v. Chief Constable of South Yorkshire and Others, [1999] 2 AC 455 (UKHL 1998) per Lord Steyn at p. 500C-D, cited in Taylor v A Novo (UK) Ltd, [2013] 3 WLR 989 (EWCA Civ 2013) at [8]. “[t]he only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the Alcock case [1992] 1 AC 310 and Page v Smith [1996] AC 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.”

¹¹ White v Chief Constable of South Yorkshire, [1999] 2 AC 455 (UKHL 1998) at p. 492,

¹² King v Bristow Helicopters Ltd. (Scotland); In Re M, [2002] 2 AC 628 (UKHL 2002) at [25].
An even broader understanding of Lord Steyn’s dicta is supported by the later strike-out case of *W v Essex County Council*\(^{13}\) where the House of Lords were confronted with a potentially new factual scenario: parents suffered psychiatric illness when they learned that a foster child, wrongly placed with them due to the council’s social worker’s negligence, had abused their children. The issue was whether, since the parents learned about the abuse only some time after it had occurred, there could be said to have been spatial and temporal proximity between the abuse (the relevant event) and the learning of it. According to Lord Slynn, the case would turn on whether, in the particular factual situation, the parents could be said to have learned about the abuse (and sustained the shock) in the “immediate aftermath” of the incident and, thus, to satisfy the requirement of temporal and spatial proximity\(^{14}\). His Lordship held that this would at least be arguable\(^{15}\) and, therefore, the claim should proceed to trial. The concept of immediate aftermath appears to be irrelevant to *Taylor v A Novo*\(^{16}\) but it is important to note how Lord Slynn, in light of Lord Steyn’s earlier judgment in *Frost*, emphasized

\(^{13}\) *W v Essex County Council*, [2001] 2 AC 592 (UKHL 2000); Lord Dyson MR’s discussion of this decision (*Taylor v A Novo* (UK) Ltd, [2013] 3 WLR 989 (EWCA Civ 2013) at [14] and [34]) focused on the “concept of the ‘immediate aftermath’ of an incident”. This relates to the second limb of Lord Dyson MR’s reasoning, Lord Dyson MR dismissing the case as irrelevant to the present case. Yet *W v Essex County Council* is of considerable significance for the, logically prior, step of understanding the scope of Lord Steyn’s dictum in *White v Chief Constable of South Yorkshire*, [1999] 2 AC 455 (UKHL 1998), i.e. the first limb of the reasoning.

\(^{14}\) *W v Essex County Council*, [2001] 2 AC 592 (UKHL 2000) at p. 601F-G.

\(^{15}\) Ibid. at p. 601G-602A.

\(^{16}\) *Taylor v A Novo* (UK) Ltd, [2013] 3 WLR 989 (EWCA Civ 2013) at [34].
the need for flexibility in dealing with new factual scenarios\textsuperscript{17}. It is of some significance that Lord Steyn himself, in this very case, agreed with Lord Slynn’s speech\textsuperscript{18}.

The trial judge in \textit{Taylor v A Novo} had concluded that the “point at issue had not been previously decided”\textsuperscript{19}, a conclusion that Lord Dyson MR tacitly appeared to accept. The issue of what the law should regard as operative “event” should, of course, be classified as legal. However, it is not an expansion of the legal \textit{categories} but rather the accommodation of a “\textit{new situation not clearly covered by existing decisions}” (Lord Slynn, see above) within existing legal categories (as permitted by the judgments of Lord Scarman in \textit{McLoughlin v O'Brian} and Lord Slynn in \textit{W v Essex CC}). Therefore, Lord Dyson MR’s reasoning\textsuperscript{20} that the trial judge had extended the scope of liability to secondary victims in a way prohibited by Lord Steyn’s dicta in \textit{Frost} seems to be flawed.

\textsuperscript{17} \textit{W v Essex County Council}, [2001] 2 AC 592 (UKHL 2000) at p. 600B-C. […] it is right to recall that in McLoughlin v O'Brian Lord Scarman, at p 430C-E, recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions; that in \textit{Page v Smith} [1996] AC 155, 197G Lord Lloyd of Berwick said that once it was accepted that the defendant could foresee that his conduct would expose the claimant to personal injury "there is no justification for regarding physical and psychiatric injury as different 'kinds of damage'"; that in this still developing area the courts must proceed incrementally: \textit{Caparo Industries pic v Dickman} [1990] 2 AC 605.

\textsuperscript{18} Ibid. at p. 602A.

\textsuperscript{19} \textit{Taylor v A Novo} (UK) Ltd, [2013] 3 WLR 989 (EWCA Civ 2013) at [19].

\textsuperscript{20} Ibid. at [31].
From this it follows that, since Lord Dyson MR’s first premise appears to be wrong, the second step in his argument does not work and the whole argument, as well as the outcome of the case, needs to be revisited.

2. THE REASONS GIVEN BY LORD STEYN

This section will argue that the reasons given by Lord Steyn to support the conclusion that the law should not be extended any further are problematic and should be rejected.

Lord Steyn stated that there are “at least” four reasons for treating psychiatric harm differently from other personal injury:

1) **there is the complexity of drawing the line between acute grief and psychiatric harm. [...] there is greater diagnostic uncertainty [...] expert evidence is required [...].**

2) **the unconscious effect of the prospect of compensation on potential claimants. [...] where there is [...] a prospect of recovery of compensation, psychiatric harm is repeatedly encountered and often endures until the process of claiming compensation comes to an end [...]. The litigation is sometimes an unconscious disincentive to rehabilitation. [...]**

3) **The abolition or a relaxation of the special rules governing the recovery of damages for psychiatric**

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harm would greatly increase the class of persons who can recover damages [...] in cases of pure psychiatric harm there is potentially a wide class of plaintiffs involved. [...] 4) the imposition of liability for pure psychiatric harm in a wide range of situations may result in a burden of liability on defendants which may be disproportionate to tortious conduct.

Those rationales, which underlie Lord Steyn’s dictum in Frost and, therefore, the basis of Lord Dyson MR’s judgment, are unconvincing.

The first reason he doubted himself, admitting that ‘on its own this factor may not be entitled to great weight and may not outweigh the considerations of justice supporting genuine claims in respect of pure psychiatric injury.’ Lord Steyn’s skepticism in respect of scientific expertise and diagnostic certainty seems increasingly outdated, especially in light of Lord Steyn’s abovementioned dicta that courts must take into account scientific advances in this field.

In his second reason, based on the notion of “compensation neurosis”, Lord Steyn relies on the case James v Woodall Duckham Construction Co. Ltd. In this case, Salmon LJ gave the leading judgment, relying heavily on expert evidence which said: ‘I do not

22 Ibid. at p. 493.
think that these [symptoms] can now be expected to clear until his action has been settled, following which I do not think there will be left any persisting serious disability.' 24. He further mentioned a statement that the plaintiff was told through his agent (apparently his solicitors), who had received a different expert’s report to the same effect: ‘[…] as soon as [your claim] is disposed of you will be able to pursue your usual avocation.’ 25

In 1995, three years before the decision in *Frost*, the *Journal of Psychosomatic Research* published an article by George Mendelson on the phenomenon of compensation neurosis. According to his findings, ‘the frequently expressed expectation that the patient will be 'cured by a verdict' is thus very often incorrect.’ 26 He stated that ‘the concept of compensation neurosis, [...] is simplistic and false’ 27 and that the continued usage of labels as ‘compensation neurosis’ ‘reflects more on the attitudes and biases of those who utilize them than on the subjects thus characterized’ 28. Regardless of whether Lord Steyn actually knew about this article (he presumably did not), it is obvious that the scientific state of knowledge in *James*, which was to some extent reflecting the 19th century hostility towards psychiatric injury claims 29, was outdated by the time when *Frost* was

24 Ibid. at p. 907.
25 Ibid. at p. 907.
27 Ibid. at p. 704.
28 Ibid. at p. 705.
29 See, e.g., Victorian Railways Commissioners v Coultas, (1888) 13 App. Cas. 222 (UKPC 1888), a famous case representing the ‘old’ approach towards psychiatric
decided. It was even more so by the time of *Taylor v A Novo* and, accordingly, should not have formed part of the basis of Lord Dyson’s decision.

**The third and fourth reasons** are the core of Lord Steyn’s reasons: the restriction of the class of potential claimants and, therefore, the burden of liability on defendants on grounds of policy reasons. This is the so-called floodgates argument. This argument is not only problematic in general, but it should also be rejected specifically with respect to the current law of liability for psychiatric injury of secondary victims of negligence.

Most developments of the law are preceded by the fear that these very developments would effect an unmanageable increase in claims. An example of this is the law of liability for psychiatric injury of *primary* victims. The two cases *Victorian Railways* and *Dulieu v White* concerned essentially identical facts: a woman, apprehending to be killed by the impact of an approaching train/van, sustains a severe shock which, in turn, causes physical illness and a miscarriage. In the *Victorian Railways* case, Sir Richard Couch, delivering the judgment of the Privy Council, argued that allowing a

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injury claims, the departure from which began with the famous case of *Dulieu v White*, [1901] 2 KB 669 (EWHC KB 1901).


31 *Victorian Railways Commissioners v Coultas*, (1888) 13 App. Cas. 222 (UKPC 1888) at p. 223 – 224; *Dulieu v White*, [1901] 2 KB 669 (EWHC KB 1901) at p. 672; the miscarriage in *Victorian Railways* is not mentioned in the report itself but it is referred to in the judgment of Kennedy J in *Dulieu v White* at p.676. However, the plaintiff in *Victorian Railways* clearly suffered some physical illness as consequence of the nervous shock.
claim for psychiatric injury caused by the fright of seeing a train approaching and apprehending to be killed would unduly ‘extend the liability’. It might lead to claims ‘not only in such a case […] but in every case where an accident caused by negligence had given a person a serious nervous shock’ and a ‘wide field [would be] opened for imaginary claims’32. Only thirteen years later, in Dulieu v White the opposite decision was reached (with Kennedy J explicitly refusing to follow the decision in Victorian Railways and disapproving the very passage quoted above as well as referring to other cases criticising Victorian Railways33). Later, Page v Smith34 completely removed the requirement that some physical harm must have resulted from the negligent act. However, despite this extension of liability, it does not seem that the “floodgates” have been opened. The argument that the fears of opening the floodgates rarely come true is also made by Teff35 (citing Fleming36).

33 Dulieu v White, [1901] 2 KB 669 (EWHC KB 1901) at p. 677-678.
35 Harvey Teff, “Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries,” Cambridge Law Journal 57, no. 1 (March 1988): 91–122, at p. 121 “[…] the experience in the statutory Australian jurisdictions has not borne out fears of becoming swamped by unmeritorious claims in the wake of relaxing the requirements of actionability; nor has the experience with such claims in the most liberal American jurisdictions figured in the complaints and conservative reform efforts of the defence interests. Perhaps the fears are after all largely imaginary, certainly exaggerated.”
The Law Commission in 1997 published a report on liability for psychiatric illness\(^{37}\). Being fully aware, and in favour, of the floodgates argument\(^{38}\), the Commission nevertheless regarded the current law as ‘unduly restrictive’\(^{39}\). They suggested dispensing with the criteria of closeness in time and space to the accident or its aftermath and of sudden appreciation through unaided senses\(^{40}\).

The Law Commission, in this respect, follows the Australian approach.\(^{41}\)

This approach was endorsed in the later Australian case of *Gifford v Strang Patrick*\(^{42}\) where the Australian High Court allowed children to recover for psychiatric injury sustained when they learned that their father had died in a work accident. The children had not witnessed the accident and, in fact, did not see their father’s body or the scene of the accident at all. They were merely informed of it, later...

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\(^{38}\) Ibid. at [6.8].

\(^{39}\) Ibid. at [6.10].

\(^{40}\) Ibid. at [6.16] and [6.10]. “[…] the most acceptable method of [limiting the potential number of claimants] is [… ] by reference to their connection with the immediate victim. 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 [… ] is limited.”

\(^{41}\) Jaensch v Coffey, (1984) 155 CLR 549 (High Court of Australia 1984) at p. at 555. “Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery.”

on the same day. However, Gleeson CJ held that this made no difference.\textsuperscript{43}

In a more general context, not specifically of Australian law, Mullany\textsuperscript{44} provides further reasons for rejecting the floodgates argument. He argues that the “normal” control mechanism relating to physical injury and other common law claims are perfectly adequate for psychiatric injury claims as well\textsuperscript{45} and that psychiatric injury claims are automatically limited because “the incontrovertible medical fact of the matter is that the psychiatric equilibrium of the vast majority of community members is not disturbed by even the most severe traumatic stimuli”\textsuperscript{46}.

While the floodgates argument is, by its nature, a matter of speculation rather than a definite and decisive line of argument, it cannot be ignored that a considerable body of medical and legal

\textsuperscript{43} Ibid. at [12]. “[…] children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.’


\textsuperscript{45} Ibid. at p. 119: “There is nothing to suggest that the normal interlocutory mechanism designed to excise baseless physical injury and other types of common law claims are somehow inadequate in psychiatric injury proceedings. Psychiatric injury is not a nebulous ailment: it is a broad recognisable medica category, of which there are numerous identified subcategories.”

\textsuperscript{46} Ibid. at p. 118-9.
experts considers it (in the way Lord Steyn stated it) as plainly wrong. This, in turn, leads to the conclusion that all of Lord Steyn’s four reasons are highly problematic. Yet, the reasoning of Lord Dyson MR in *Taylor v A Novo* shows that these dicta still form a cornerstone of this area of law. It follows that there is urgent need to reconsider Lord Steyn’s dicta.

**CONCLUSION**

Lord Scarman said in *McLoughlin*\(^{47}\): “The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach.” Sadly, this risk appears to have materialized in *Taylor v A Novo*. Given that the law on negligence should develop “incrementally and by analogy with established categories”\(^{48}\) it seems questionable whether such a judicial bar (especially with respect to new factual scenarios: see above) can, or should, be imposed at all. More importantly, however, the specific reasons given by Lord Steyn do not stand up to closer scrutiny and, accordingly, should be rejected. It is to be hoped that this area of law will be revisited in the near future and that the courts will use such an opportunity to remedy the flaws in the current law.

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