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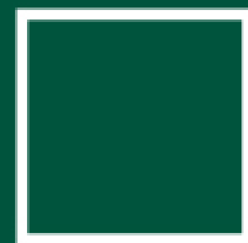

Talk for AvMA

Secondary Victims in Clinical Negligence

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Introduction and Background

What are Primary and Secondary Victims?

- **Primary Victims**

  Those who were immediately or directly involved in the incident and were well within the range of foreseeable physical injury. The primary victim may recovery damages for an unforeseeable psychiatric illness, as long as some sort of physical (even if not actually suffered) injury was reasonably foreseeable.

- **Secondary Victims**

  Those who witness the death or injury of another person. This is also subject to reasonable foreseeability of psychiatric harm, but also further control measure.

Development of the Primary Victim Test

Initially there was a broad definition given to primary victims, set out in **Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 301.**

Lord Oliver "These are all cases where the [Claimant] has, to a greater or lesser degree been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself, or in coming to the aid of other injured or threatened" and "*in which the claimant was involved, either mediately or immediately, as a participant*"

But this definition became more restricted in scope in **Page v Smith [1996] AC 155**:

Lord Lloyd "One who is directly involved in the accident, and well within the range of foreseeable physical injury".

Which was confirmed in **White v Chief Constable of South Yorkshire Police [1999] 2 AC 455**

Not-So-Obvious Primary Victims – Clinical Negligence

Farrell v Avon Heath Authority [2001] Lloyd's Rep. Med. 458

"On this purely factual basis, the Claimant here is clearly a primary victim as he was physically involved in the incident itself. Indeed, that also accords with common sense. How can there be a secondary victim if there is no other person who was physically involved in the incident as a potential victim?"

"…as the claimant is a primary victim it is therefore sufficient for him to show that the defendant ought to have had psychiatric injury in its contemplation"

"the test to be applied here is whether the defendant ought reasonably to have foreseen that its conduct would expose the claimant to the risk of a recognised psychiatric disorder."

See Also Allin v City and Hackney Health Authority [1996] 7 Med LR 167

AB v Tameside and Glossop Health Authority [1997] PNLR 140

"In my judgment, once the defendants had decided to inform their patients at all, they were under a duty to take such steps to inform them as were reasonable, having regard both to the foreseeable risk that some of them might suffer psychiatric injury (or any existing psychiatric injury might be materially aggravated) upon receipt of the information and to all the other circumstances of the case"

Secondary Victims – The Test

Alcock control mechanisms, as expanded and defined but absolutely accepted as:

1. Close tie of love and affection

2. That the Claimant in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards – Close in time and space.

3. Direct perception of the events

4. Induced by a sudden, shocking event.

5. Recognised psychiatric injury must result

All of the above subject to psychiatric injury being a reasonable foreseeable consequence of D's negligence.

(1) Close Tie of Love and Affection

- Generally the least problematic of the criteria
- It is for the Claimant to prove the close tie of love and affection with the deceased/injured person.
- May be present in family relationships, those of close friendship.
- Presumption (rebuttable) in the case of a spouse, parent or child.
- Any further classes (including siblings/cohabiting couples etc.) need to prove, on the facts, and with evidence that they had a sufficiently close relationship.
- Closeness test - should be akin to that of a spouse, parent or child relationship

(5) Necessity for Recognised Psychiatric Injury

- Also unlikely to be hugely contentious (though see **Shorter**, below)
- Must be more than severe and prolonged bereavement reaction but a medically identifiable psychiatric illness or injury. Such illness or injury to be distinguished from emotional distress or injury to feelings, for which no successful claim can be made in the absence of physical injury.
- "Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point" Lord Oliver in Alcock.

(2) Close to the Incident in Time and Space and (4) Sudden Shocking Event

Likely to be the most difficult hurdles to overcome for clinical negligence related cases and often considerations apply in respect of both, so can look at the both tests together.

“there must be both physical and temporal propinquity between claimant and defendant and claimant and the event. Without the sudden and direct visual impression on the Claimant's mind of actually witnessing the event or its immediate aftermath there is no liability. The elements of proximity and causation are closely linked together.” Ward LJ in **Walters**

It can also be a somewhat artificial exercise, involving as it does decisions about what constitutes an “event” or the “immediate aftermath” thereof and whether the Claimant's experience of the event or its immediate aftermath can properly be described as “horrifying”, “shocking” and/or “sudden and unexpected” – **Shorter**

Application of (2) and (4) in Clinical Negligence Cases

Taylor v Somerset Health Authority [1003] 4 Med LR 34

"There was no such event here other than the final consequences of Mr Taylor's progressively deteriorating heart condition which the health authority, by its negligence many months before, had failed to arrest. In my judgement, his death at work and the subsequent transference of his body to the hospital where Mrs Taylor was informed what had happened and where she saw the body do not constitute such an event"

Sion v Hampstead Health Authority [1994] 5 Med LT 170

"In my opinion there is no trace in that report of shock, as defined by Lord Ackner, no sudden appreciation by sight or sound of a horrifying event. On the contrary, the report describes a process continuing for some time, from first arrival at the hospital to the appreciation of medical negligence after the inquest. In particular, the son's death when it occurred was not surprising, but expected".

But then came North Glamorgan v Walters [2002] EWCA Civ 1792

- Trust negligent in failing to diagnose child's hepatitis, Mother sought damages for psychiatric illness sustained as a consequence.

What is the Event?:

- "It is a matter of judgment from case to case depending on the facts and circumstance of each 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 the 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…" **Ward LJ**

On "sudden shock":

- The Court differentiated between those cases where there was a "gradual dawning of realisation" and sudden and unexpected assaults on the mind.
- Took place over a period of time (36 hours) but in that time, "the assault on her nervous system had begun and she reeled under successive blows as each was delivered"
- Shocking or horrifying event must be judged by objective standards and by reference to persons of ordinary susceptibility.

But Contrast subsequent cases of:

Shorter v Surrey and Sussex Healthcare NHS Trust [2015] EWHC 614 (QB)

"There was not a seamless single horrifying event. There was a series of events over a period of time…none of the individual events…gave rise to the sudden and direct appreciation of a horrifying event".

Liverpool Women's Hospital v Ronayne [2015] EWCA Civ 588

"The Judge was wrong to regard the events of this period of probably about 36 hours as one event. It was not like Walters…there was…a series of events over a period of time".

"A gradual realisation…At each stage in this sequence of events the Claimant was conditioned for what he was about to perceive". Tomlinson LJ

Why is it difficult to satisfy the control mechanisms for Clinical Negligence cases?

"In hospital one must expect to see patients connected to machines and drips, and…expect to see things that one may not like to see. A visitor to a hospital is necessarily to a certain degree condition as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter, likely to prove more than ordinarily distressing" – **Ronayne**

"Cases of clinical negligence present particularly difficult problems. The factual background of cases can be very different and often quite complex. The nature and timing of the "event" to which the breach of duty gives rise will vary from case to case" – **Shorter**

Limited by third control measure "direct perception".

(3) Direct Perception – Seeing With Own Eyes

- Consider birth injury cases:
  - Likely to have relatives/people of closeness present.
  - Likely to be there at that very time of the “event”/”events”
  - Likely to directly appreciate

Wild v Southend University Hospital Foundation Trust [2014] EWHC 4053

- The Mother was the primary victim – treatment of foetus and mother as one legal person.
- Court rejected submission that a Father would never recover in stillbirth cases.
- “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” Michael Kent QC

Wells v University Hospitals Southampton NHS FT [2015] EWHC 2376

- Mother primary victim. It was common ground that the would-be negligent failure to take the mother for a Caesarean section when the baby had aspirated the meconium occurred when the mother and the baby were still considered to be one person.
- Here the baby was born alive.
- “There was no assault on the senses. There was no sudden appreciation of an event, or perhaps the gradual dawning of realisation that the child’s life was put in danger”

RE (A Child) v Calderdale and Huddersfield NHS Foundation Trust [2017] EWHC 824

- Claims by Mother and Grandmother
- Was denied by Defendant that Mother was a primary victim. Court found that negligence occurred when RE's head had crowned but her body remained in the birth canal. At this point she was not a separate legal entity from her Mother and, in law, they are to be treated as one. The delayed delivery triggered the commencement of the hypoxic event whilst she was still in utero.
- Concluded Mother was primary victim.
- But the Court nevertheless considered whether she might recover as a secondary victim if the Court were wrong about primary victim.
- Direct and vivid evidence given of baby

- “There was no conditioning for what came, nor was there any warning of a materialising risk that RE would be born lifeless and require a sustained period of resuscitation . I am satisfied that, for the [Mother’ this was an outwardly shocking experience that was exceptional in nature and horrifying as judged by objective standards and by reference to persons of ordinary susceptibility. It was not an event of the kind to be expected as part and parcel of the demands and experience of childbirth”

- “I am satisfied that her first-hand observation of the first 15 minutes of life, that is the period immediately following her birth, was the trigger…the event was sufficiently sudden, shocking and objectively horrifying to reach the conclusion that the [Grandmother’s] claim…is established”

Mr Justice Goss

Where Are We?

- It’s really difficult to bring a secondary victim claim arising out of clinical negligence cases.
- Cases can get through the control mechanisms unless they are something truly exceptional – whilst we have seen some positive results, those cases go beyond the deeply distressing and amount to a real assault on the senses. The successful cases haven’t changed that test, only solidified it.
- Calls for reform haven’t amounted to anything.
- Sometimes it appears there is conflict within the case law – cannot be escaped that it is a difficult area to navigate, extremely fact sensitive.
- “Patchwork quilt” of distinctions difficult to justify.

Thank you

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