Secondary victim claims in clinical negligence actions

In 1968 Quintin Hogg Q.C. (the future Viscount Hailsham L.C.), writing in *Punch* magazine, described a decision of the Court of Appeal as "a strange example of the blindness which sometimes descends on the best of judges"[1]. Well here's another one.

In *Paul v The Royal Wolverhampton NHS Trust* [2020] EWHC 1415 (QB) Chamberlain J allowed the claimants' appeal from the order of Master Cook [2019] EWHC 2893 (QB) striking out their claims for damages for psychiatric injury allegedly suffered when they witnessed the collapse of their father in the street following a fatal heart attack in January 2014.

The facts

The deceased, who suffered from ischaemic heart disease and occlusive coronary artery atherosclerosis, had been admitted to the defendant's hospital in November 2012 and discharged without appropriate cardiac investigations being undertaken. The claimants' case was that coronary angiography should have been performed, which would have revealed significant coronary artery disease which could and would have been successfully treated by coronary revascularisation, and that had this taken place he would not have suffered the cardiac event in 2014.

The issue: proximity

The claimants, as secondary victims, had to satisfy the criteria for the imposition of liability formulated by the House of Lords in *McLoughlin v O'Brian* [1983] 1 AC 410 and *Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310. It was agreed between the parties that the only issue was whether they could satisfy the criterion of "proximity".

Proximity is a familiar legal concept in the law of negligence generally. It describes the relationship between parties which is necessary in order to found a duty of care owed by one to the other, i.e. for them to be *Donoghue v Stevenson "*neighbours". This may be termed "proximity in law". However, in secondary victim actions, where the claimant's perception of a qualifying (i.e. sufficiently horrifying) "event" (or its "immediate aftermath") is a necessary condition for liability, the word is used, in a second and separate sense, to describe the secondary victim's propinquity in time and space to an event which is necessary to enable the secondary victim to maintain an action against the tortfeasor, a shorthand description of which would be "proximity in fact".

The dispute between the parties in the present case was as to the point in time at which proximity in fact needed to be established. The claimants' case was that this was the occurrence of the qualifying "event" (in the present case the collapse and death of their father); the defendant's case was that it was the occasion of commission of the tort, which was when the primary victim first suffered actionable damage (this being on or soon after failure to diagnose or treat his vascular disease).

This question will arise in cases where the secondary victim sustains psychiatric injury in consequence of perceiving not the commission of the tort, or the primary victim's initial injury (either or both of which might be described as the "accident"), as opposed to some later "event". It may therefore typically arise in a clinical negligence action where there is negligent treatment resulting in a latent pathology, which manifests itself in the patient's injury or death at a later time; alternatively (as alleged in the present case) a failure to diagnose and/or treat an existing condition, which failure eventually causes injury, or death.

But the issue only arises where there are two separate events, (1) the commission of the tort, and (2) the subsequent occurrence of injury or death. So it would not arise in a case where, for example, a garage negligently serviced a car, which negligence caused the brakes to fail and the owner to drive the car off a cliff some time later. Although the owner's cause of action in contract arose when the work was negligently performed, his cause of action in tort did not arise until he drove the car off the cliff. It would follow that the secondary victim who saw the accident could satisfy the criterion of proximity. Likewise, no problem would arise in a clinical negligence action where there is no evidence that the defendant's negligence caused any injury or damage until the later fatal event.[2]

The authorities

The issue does not arise where the qualifying event (injury to or death of the primary victim) is synchronous with the commission of the tort, as will be the position in most accidental injury cases. The accident, injury and/or death will all have been sufficiently close in time to form part of a single "event" to which the secondary victim may or may not be in a position to prove proximity – which depends upon his having witnessed the event or its immediate aftermath.

It did not, therefore, arise in any of the House of Lords cases, *McLoughlin, Alcock, Page v Smith, Frost v Chief Constable of South Yorkshire Police,* in which the elements of secondary victim liability had been judicially defined. It follows that reference to passages in the speeches in those cases to "proximity to the accident" or "proximity to the event" tells us nothing about what the answer should be where the qualifying event relied upon by the secondary victim post-dates the "accident" or commission of the tort.

However, the issue of what is the relevant occasion for the existence of proximity in fact in a "two event" case had been decided by the Court of Appeal, in *Taylor v A.Novo (UK) Ltd.* The primary victim was the claimant's mother, who had suffered injuries to her head and foot when some boards fell on to her while she was at work, due to the negligence of her employer, the defendant. About 3 weeks later she collapsed and died as a result of pulmonary emboli caused by her injuries suffered in the accident. Her daughter, who suffered psychiatric injury as a result of witnessing the death, sued as a secondary victim. Her action failed; there had been two distinct events, (a) the sustaining of injury in the initial accident, and (b) the subsequent pulmonary emboli which caused her death. The "event" to which the claimant needed to prove proximity was

(a), rather than (b). As Lord Dyson MR stated, at [32]

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. In such a case, the relevant event is the accident. It is not a later consequence of the accident. ..Ms Taylor would have been able to recover damages as a secondary victim if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She cannot recover damages for the shock and illness that she suffered as a result of seeing her mother's death three weeks after the accident.

The ratio decidendi of this decision is, therefore, that in secondary victim cases proximity must be proved at the date of the event which completes commission of the tort (which may conveniently be described as the "scene of the tort"), and proximity at the date of subsequent injury is insufficient.

The judge's decision

Nevertheless, Chamberlain J allowed the claimants' appeal from the decision of Master Cook[3] striking out the claims on the ground that they were bound to fail. His reason for so doing was that, for the purposes of the strike out application, he had to proceed on the factual basis most favourable to the claimants, which was that Mr Paul had suffered no damage prior to the moment of his heart attack, which was itself therefore the "scene of the tort"; in other words, this was arguably not a "two event" case. True it of course is, that on a strike out application under CPR 3.4(2)(a) the court is limited to considering whether the statement of case discloses reasonable grounds for bringing the claim. Accordingly if the particulars of claim had averred that Mr Paul had suffered no damage prior to his heart attack, the court would have been required to assume that this averment was true. However, it does not appear from the report that the particulars of claim did so aver, as opposed to alleging that Mr Paul's collapse was the "first manifestation of the Defendant's breach of duty". It is trite law that damage sufficient to complete the tort may occur without the victim being aware of the same (*Cartledge v Jopling*); it would seem to follow that "manifestation" of the defendant's breach of duty is not a relevant occurrence, unless the word is intended to describe the point at which damage has been suffered. But if such be the case Mr Paul clearly had suffered damage due to the defendant's breach of duty before his collapse. On the claimants' case, when he left the hospital he had partially blocked coronary arteries, with consequent risk of cardiac failure, whereas had he been treated with due care, these blockages would have been wholly or partially eliminated. He was therefore "worse off" than he would have been but for the defendant's negligence; this was "damage" sufficient to complete his cause of action in anyone's language[4]; cf *Grieves v FT Everard & Sons Ltd* (the pleural plaques litigation)[5] and *Dryden v Johnson Matthey plc*.[6]

In fact, as appears from the judgment of Master Cook, it does not seem to be the case that Mr Paul's collapse in 2014 was the first "manifestation" on any view. He had been admitted to hospital in September 2013 with a two to three week history of breathlessness and had undergone an ECG which showed significant abnormalities. Be that as it may, even if Chamberlain J's decision on the strike out application might have been justified, it is difficult to see how, if he was applying the "scene of the tort" test, he could have failed to conclude that the defendant was entitled to succeed on its summary judgment application under CPR 24.2, i.e. on the ground that the claimants had no real prospect of succeeding. Even if Mr Paul's coronary artery disease (which on the claimants' case should have been successfully treated) had not "manifested" itself to him or anyone else, it would ex hypothesi obviously have been visible on a coronary angiogram. This was therefore plainly a two event case.

Obiter dicta

Having allowed the claimants' appeal on the narrow ground that, on the face of the claimants' pleaded case, it was arguable that no tort had been committed prior to January 2014, the judge went on to consider what the position was if the defendant's negligent failure of diagnosis had given rise to actionable damage at the time. He opined that the answer was that the claimants could still succeed because the qualifying "event" (which was the point at which proximity needed to be established) would still be the collapse in 2014, and not the damage which completed Mr Paul's cause of action, because the relevant "event" only occurred when the same became "manifest" or "evident." He therefore distinguished *Taylor v Novo* on the ground that in that case, unlike the present, there had been an "evident" event (the collapse of the shelving on to Mrs Taylor) at the scene of the tort, whereas in the present case there had not.

Discussion

The judge's obiter dicta, if correct, would represent a significant extension to the scope of liability to secondary victims that has been recognised in any previous case. It would mean that a secondary victim's cause of action could arise long, even potentially many years, after the commission of the defendant's tort against the primary victim. This would seem inconsistent with the "thus far and no further" prescription of Lord Steyn in *Frost v Chief Constable of South Yorkshire Police,* with which Lord Hoffmann and Lord Browne-Wilkinson agreed in that case, and which was one of the two stated reasons for the Court of Appeal's decision in *Taylor v Novo*.

It is also difficult to see why, in principle, successive secondary victims could not succeed if each witnessed a different sufficiently horrifying event caused by the defendant's tortious act. Take, for example, the case of a young child who suffers brain damage as a result of the defendant's clinical negligence. The damage causes no immediately evident signs or symptoms but in fact gives rise to a significant epilepsy risk (so that the tort is complete). The child begins to suffer alarming and distressing fits some years later. The first is witnessed by his mother, the second by his father and the third by his sister, all of whom suffer psychiatric injury. Can all three successfully sue the defendant, or if not, why not? Chamberlain J, at [79], suggested not, stating "If it is necessary to identify a stopping point after which the consequences of a negligent act or omission can no longer qualify as an 'event' giving rise to liability for psychiatric damage in a secondary victim, the most obvious candidate is the point when damage to the primary victim first becomes manifest or, as Swift J put it in *Shorter,* 'evident'". But, while this may be a pragmatic solution, it is difficult to identify any principle underlying it. In the example of the epileptic child above postulated, why should only the first observer succeed and the others not? Surely each has a distinct cause of action independent of the others. What if it could not be proved which of them was the first to witness a fit? Presumably none of them could succeed. Also, supposing medical evidence established that the child must have had an earlier, unwitnessed, fit. Again, presumably none of the family could succeed. These would surely be arbitrary and, more importantly, unprincipled consequences.

Nor is it easy to understand, for the purpose of distinguishing *Taylor v Novo*, the principled distinction between injury which is "manifest" or

"evident", (presumably to the naked eye), and one which is visible only via an angiogram or EEG or some other form of scan. If one of the family of the epileptic child above referred to happened to be a radiographer, he or she might equally have found the brain scan horrifying.

None of the above anomalies and illogicalities exists if the analysis contended for by the defendant in this case is accepted, namely that proximity between the defendant and the secondary victim must be assessed at the time of the commission of the tort against the primary victim. Had that approach been adopted the judge should surely have concluded that the claims were bound to fail. Mr Paul suffered damage caused by the defendant's assumed negligence, at the latest, on the date when if correctly diagnosed he would have undergone successful treatment for his coronary artery disease. He was then "worse off" than he would have been but for the defendant's negligence. The decision in *Taylor v Novo* should have bound the judge to hold that to be the moment at which the proximity test needed to be satisfied, but could not be.

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[1] This was held not to amount to a contempt of court*: R v Metropolitan Police Commissioner. Ex parte Blackburn (No.2)* [1968] 2 QB 150.

[2] Cf *Werb v Solent NHS Trust* (Master Roberts, 15 March 2017, unreported)

[3] [2019] EWHC 2893 (QB)

[4] It is a moot point whether the cause of action arose when Mr Paul should have been, but was not, advised of his disease and the need for remedial treatment, or on the date when, if correctly advised, he would have undergone the successful treatment.

[5] [2008] 1 AC 281

[6] [2019] AC 403