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King's Bench Walk

Primary victim, secondary victim or no victim at all?

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Background: the *Alcock* criteria

- ▶ Secondary victims must satisfy the criteria established in *Alcock v CC of South Yorkshire Police* [1992] 1 AC 310
 - ▶ The Claimant must have a **close tie of love and affection** with the primary victim
 - ▶ The Claimant must have been present at the relevant event or its immediate aftermath (**proximity in time and space**)

Background: the *Alcock* criteria

- ▶ The psychiatric injury must have been **caused** by direct perception of a **shocking** event or its immediate aftermath.
 - ▶ Whether the event concerned was in the necessary sense '**horrifying**'?
 - ▶ Whether the sudden appreciation of that event i.e. shock, **caused** his psychiatric illness?

Successful primary victim claims

- ▶ Where physical injury reasonably foreseeable (*Page v Smith*)
- ▶ The birth cases
 - ▶ *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB)
 - ▶ *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376
 - ▶ *Yah v Medway NHS Foundation Trust* [2018] EWHC 2964 (QB)
 - ▶ *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 980 (QB)

Successful primary victim claims: physical injury reasonably foreseeable

- ▶ *Page v Smith* [1996] AC 155
 - ▶ C suffered a pure psychiatric injury after a RTA.
 - ▶ Held: Primary victims can recover if physical injury is reasonably foreseeable, even if the injury that results is only psychiatric.

Successful primary victim claims: the birth cases I

- ▶ *Yah v Medway NHS Foundation Trust [2018] EWHC 2964 (QB)*
 - ▶ Mother suffered psychiatric injuries after her seeing her child for the first time
 - ▶ She did not see the child until the day after she was born because of the complications arising from the negligence that occurred in the course of the birth
 - ▶ Mother successfully claimed as a primary victim but would not have succeeded as a secondary victim

Successful primary victim claims: the birth cases 2

► Whipple J summarises the present state of the law as follows:

'21. ... First, it is settled law that a baby is part of its mother until birth; there is, up to that point, a single legal person. Each of the three cases to which I was referred (*Wild, Wells* and *RE*) illustrate this principle. There is, of course, a much larger body of case law and commentary which establishes the principle – the deputy judge touched on some of it at [21] of *Wild*.

22. It flows from that principle that the mother is a primary victim in so far as she suffers personal injury consequent on negligence which occurs before the baby is born. I believe this also to be settled law. Certainly, it is endorsed in the three cases to which I was referred.

24. ... But it is important to be clear that the Claimant did not cease to be a primary victim at the moment XAS was born. The fact that the Claimant's psychiatric damage became manifest later in time, after XAS was born, does not change the Claimant's status. She was and is a primary victim, in so far as she suffered personal injury caused by negligence which occurred before XAS was born.

25. The Claimant is a primary victim. Accordingly, this claim falls to be determined according to the ordinary rules governing personal injury claims in negligence. It does not fall to be determined by reference to the *Alcock* criteria, which attach only to secondary victim claims.'

Successful primary victim claims: the birth cases 3

- ▶ *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB) - C mother was a primary victim because she and the baby were one when the negligence occurred. On the facts though she could not recover as there was no negligent breach by D.
- ▶ *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB) - Where C mother is told that a child she is carrying has suffered (negligent) injuries, and witnessing the birth is a psychiatrically triggering experience, that mother will be a primary victim.
- ▶ *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 980 (QB) - the same approach was again endorsed by Martin Spencer J who found the Claimant mother of a stillborn child to be a primary victim.

Successful secondary victim claims

- ▶ *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792
- ▶ *RE (a minor) v Huddersfield and Calderdale NHS Foundation Trust* [2017] EWHC 824 (QB)

Successful secondary victim claims: *Walters*

- ▶ *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792
 - ▶ C mother witnessed the traumatic seizure and subsequent death of her baby son 36 hours later, caused by negligent misdiagnosis.
 - ▶ Such an event was not confined to one moment in time and, taking a realistic approach to the facts, the 36 hour period prior to death could be classed as a single horrifying event
 - ▶ C recovered as a secondary victim since the seizure event and death event were part of “a seamless tale with an obvious beginning and an equally obvious end” [34]

Successful secondary victim claims: *RE (a minor)*

- ▶ *RE (a minor) v Huddersfield and Calderdale NHS Foundation Trust* [2017] EWHC 824 (QB)
 - ▶ Infant claimant suffered a brain injury during her protracted birth and was born in an extremely poor condition
 - ▶ C mother succeeded as a primary victim would also have recovered as a secondary victim.
 - ▶ C grandmother also witnessed the birth and aftermath and succeeded as a secondary victim.

Successful secondary victim claims: *RE (a minor)*

▶ Goss J:

‘In relation to the control mechanisms to be satisfied if the Second Claimant is a secondary victim, she is clearly in the closest possible personal relationship to RE, whose condition on birth was a sudden and unexpected event and not a process of gradual realisation. 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 Second Claimant, 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.’

Unsuccessful secondary victim claims

- ▶ For want of proximity to the relevant event
 - ▶ *Taylor v A Novo (UK)* (2013) EWCA Civ 194
 - ▶ *Purchase v Ahmed* [2020] 5 WLUK 249
- ▶ For want of sufficient shock / horror
 - ▶ *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB)
 - ▶ *Brock v Northampton General Hospital NHS Trust* [2014] EWHC 4244 (QB)
 - ▶ *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB)
 - ▶ *Yah v Medway NHS Foundation Trust* [2018] EWHC 2964 (QB)
- ▶ For want of proximity and sufficient shock / horror
 - ▶ *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588
 - ▶ *Shorter v Surrey & Sussex Hospitals NHS Trust* [2015] EWHC 614 (QB)
 - ▶ *Owers v Medway NHS Foundation Trust* [2015] EWHC 2363 (QB)

Unsuccessful secondary victim claims: no proximity to relevant event

- ▶ *Taylor v A Novo (UK)* (2013) EWCA Civ 194
 - ▶ Primary victim was C'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
 - ▶ About 3 weeks later she collapsed and died as a result of pulmonary emboli caused by her injuries suffered in the accident.
 - ▶ At first instance C found to be a secondary victim - relevant horrifying event was the death and there was sufficient proximity with the psychiatric reaction for C to recover as a secondary victim.

Unsuccessful secondary victim claims: no proximity to relevant event

- ▶ D appealed:
 - ▶ C was not a secondary victim
 - ▶ Wrong to have held that the mother's death was the "relevant event"
 - ▶ Relevant event is the accident, not a later consequence of the accident [32]
- ▶ The decision makes it difficult to recover as a secondary victim in a clinical negligence context, save where the later consequences form part of the same event in a "seamless tale" as in *Walters*.

Unsuccessful secondary victim claims: no proximity to relevant event

- ▶ Text book application of *Taylor v A Novo*
- ▶ *Purchase v Ahmed* [2020] 5 WLUK 249
 - ▶ V died as a result of alleged negligence
 - ▶ C (her mother) discovered her dead at home
 - ▶ The relevant “event” was the negligence, not the discovery of the dead body (3 days later)
 - ▶ The claim was struck out with no reasonable prospects of success

Unsuccessful secondary victim claims: not shocking enough

► In *Alcock*, Lord Ackner said:

“Shock” in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.’ [40 IF]

Unsuccessful secondary victim claims: not shocking enough

- ▶ The test was further considered in a clinical negligence context in *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588, per Tomlinson LJ:
 - ▶ Husband witnessed his wife's rapid deterioration which was in two distinct episodes over 24 hours as a result of D's negligence.
 - ▶ Held: Not a secondary victim: a series of events with gradual impact, not a sudden appreciation of one. Further, what he witnessed was not objectively horrifying.
 - ▶ '13...the question whether an event is for these purposes to be recognised as in the relevant sense "horrifying" must be judged by objective standards and by reference to persons of ordinary susceptibility.'

Unsuccessful secondary victim claims: not shocking enough

- ▶ Following *Ronayne*, witnessing an event in a hospital context is only likely to lead to a successful claim for psychiatric injury as a secondary victim in 'wholly exceptional' circumstances
- ▶ Witnessing alarming and distressing events is to ordinarily be expected in certain circumstances when a loved one is in hospital

Unsuccessful secondary victim claims: not shocking enough

- ▶ *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB) – Baby died in utero as a result of negligence. Parents went into hospital thinking labour had begun but were told that the baby had died - they went home for the night and then returned for it to be delivered - C father sought to recover as a secondary victim, on the basis that the realisation of the baby's death was a shocking event. Held: the event was the realisation that the baby had died and was not comparable to *Walters* - retrospective discovery did not constitute a shocking event in the secondary victim sense.
- ▶ *Brock v Northampton General Hospital NHS Trust* [2014] EWHC 4244 (QB) - C daughter died as a result of a negligently inserted bolt in theatre - not secondary victims - their experience was in the range of human experience, and not exceptional in the circumstances

Unsuccessful secondary victim claims: not shocking enough

- ▶ *Shorter v Surrey & Sussex Hospitals NHS Trust* [2015] EWHC 614 (QB) - C sister claimed for seeing her sister suffer and then die of a subarachnoid haemorrhage. Claimed on the basis that like *Walters*, there was one seamless event. D defended on the basis that there was no shocking event, it was a gradual realisation on C's part. Held: not a secondary victim: no shocking event. Nor was there one event, there were a series of events over time and the sights were not sudden or unexpected [218]
- ▶ *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB) - Negligent delay carrying out a C-section and aspiration which resulted in the baby dying. The baby was born blue, was taken away for resuscitation and died after 30 minutes. Parents then told and baby brought back to spend time with them overnight before being taken for a post-mortem - C father could not recover as a secondary victim because there was no shocking event / sudden realisation / assault on the senses.

Unsuccessful secondary victim claims: not shocking enough

- ▶ *Yah v Medway NHS Foundation Trust [2018] EWHC 2964 (QB)*

‘86. Although the Claimant's experiences during the delivery of XAS and afterwards were shocking and traumatic, using those terms in the ordinary way, they do not constitute "shock" in an *Alcock* sense. Thus, the Claimant would not, if she was a secondary victim, have been entitled to recover damages.’
- ▶ Difficult to reconcile with *RE (a minor)*
 - ▶ Secondary victim cases, particularly in this context, are extremely fact sensitive
 - ▶ Will depend upon careful analysis of the lay evidence, the medical evidence, and the contemporaneous documentation
 - ▶ Also partly a reflection of different ranges of opinion within the judiciary as to what amounts to ‘horrifying’

Paul v Royal Wolverhampton NHS Trust

- ▶ The Claimants' father – Mr Paul – collapsed and died of a heart attack in 2014. The alleged negligence occurred two years earlier in 2012 when the Defendant Trust failed to diagnose Mr Paul's significant coronary artery disease. The Claimants, aged 12 and 9 at the time of their father's death, witnessed Mr Paul's collapse and the attempts made by ambulance crew to resuscitate him.
- ▶ The Claimants' pleaded case was that Mr Paul's collapse in January 2014 was “the first manifestation of the Defendant's breach of duty”
- ▶ In November 2019 Master Cook held that the claims were bound to fail, and they were struck out:

“Mr Paul's tragic death 14½ months after the negligent incident, in circumstances separated in space and time from the negligence I must assume occurred in the hospital, cannot possibly be said to be the 'relevant event' for deciding the proximity required to establish liability under the established control mechanisms.”

Paul v Royal Wolverhampton NHS Trust

- ▶ On appeal, the Claimants argued that:
 - ▶ *Walters* is authority for the proposition that the shocking event can be an event caused by the defendant's negligence rather than the defendant's negligent act or omission itself; and
 - ▶ The Master was wrong to strike out the claims, given the developing and uncertain nature of the law in this area.
 - ▶ In neither *McLoughlin* or *Alcock* was it said that there must be temporal proximity between the negligence and the shocking event. The proximity required is, rather, between the claimant and the shocking event.

- ▶ The Defendant argued the opposite i.e. that:
 - ▶ The Master was right to look for a “a proximate connection” between the negligence and the shocking event.
 - ▶ The tort here became actionable at the time of or immediately after Mr Paul's admission to hospital in November 2012
 - ▶ *Taylor v A Novo* was fatal to the claim.

Paul v Royal Wolverhampton NHS Trust

- ▶ Chamberlain J allowed the claimants' appeal, and distinguished *Taylor v A. Novo*, on the basis 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:

“The fact that the event occurred 14 ½ months after the negligent omission which caused it does not, in and of itself, preclude liability. Nor does the fact that it was not an “accident” in the ordinary sense of the word, but rather an event internal to the primary victim. In a case where such an event is the first occasion on which damage is caused, and therefore the first occasion on which it can be said that the cause of action is complete, *Taylor v A. Novo* does not preclude liability.”

Practical considerations

- ▶ What was 'directly perceived'?
- ▶ What is the 'relevant event'?
- ▶ What was particularly shocking / horrifying about it?

- ▶ Does the contemporaneous documentation provide support?
- ▶ Relationship between 'relevant event' and 'shock' needs to be carefully dealt with in:
 - ▶ Expert evidence
 - ▶ Lay evidence
 - ▶ Pleadings

The Future

- ▶ Does this signify a change in approach?
- ▶ The *Alcock* criteria have always been 'pragmatic' and based on policy considerations
- ▶ They have been robustly maintained over nearly 30 years with only modest erosion / refinement to allow a handful of Claimants to succeed
- ▶ Concern as to 'floodgates' in clinical negligence context because for every injured C there is likely to be a relative with close ties of love and affection with the potential for suffering psychiatric injury as a result

THE END