BRIEFING

SECONDARY VICTIM CLAIMS

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SECONDARY VICTIMS

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So-called "secondary victim" claims for damages for psychiatric injury are hard to establish. For the last 30 to 40 years, and for reasons founded in both difficulties of diagnosis and perhaps a mistrust of injuries you cannot see, claims for damages for psychiatric injuries have been regulated by "control Mechanisms". Some were removed by the House of Lords in *Page v Smith* [1996] AC 155, but only for "primary victims". For "secondary victims" – i.e. those who witnessed the death or injury of someone else and suffer psychiatry as a result – formidable obstacles to success still remain.

A secondary victim must prove (a) that he/she witnessed a shocking, horrifying event (or its immediate aftermath) that (b) caused recognisable psychiatric injury and (c) that he/she had a close tie of love and affection with the person injured, killed or imperilled and (d) that the event was witnessed by direct perception (and not by having heard about the event from a third person or through some other medium) and (e) that he/she was close to the shocking event in both time and space.

Secondary victim cases over the years have turned on all of these different control mechanisms. Has the Claimant suffered a recognisable psychiatric illness? Was the event that caused the psychiatric illness truly shocking, sudden and horrifying? But perhaps the most tricky problem - and the one addressed in Chamberlain J's recent decision in *Paul v Royal Hampton NHS Trust* [2020] EWHC 1415 (QB) - is what constitutes an "event" for these purposes?

Since the House of Lords first grappled with secondary victim claims in *McLoughlin v O'Brian* [1983] 1 AC 410 there have been a number of cases that have addressed the question. Often, it is easy to identify an event – a car or rail crash, for example or witnessing loved ones dying in the Hillsborough disaster (*Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310). It may be less easy to define the limits of the "event" and its "immediate aftermath", but in these cases there has been a single event, caused by negligence, that is

easily identifiable.

But what happens when the negligence is not contemporaneous with the shocking event? In *Taylor v A Novo* [2014] QB 150 the Claimant's mother sustained injury at work when a stack of racking boards fell on her. She seemed to be making a good recovery but three weeks later she collapsed and died as a result of her original injuries, in front of the Claimant, who suffered psychiatric injury. The Court of Appeal held that there was one event – i.e. the original accident – with two consequences (i.e. the original injury to the Claimant's mother and then the Claimant's mother's death three weeks later), and that as the Claimant had not witnessed the event – in this case the original accident – her claim must fail.

On the other hand, in *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, [2003] PIQR P16, the Court of Appeal upheld a claim in which a baby was negligently treated in hospital, as a result of which, a few weeks later, he was brought back to hospital by his mother where he suffered a fit, catastrophic brain damage and died – all of which was witnessed by his mother. The mother suffered psychiatric injury. The Court of Appeal upheld the claim on the basis that what the mother witnessed was an "event", but there is no suggestion that because the negligence had occurred earlier than the manifestation of the damage it caused, that the claim should fail.

Practitioners have been puzzling for a while as to how the cases of *Walters and Taylor v A Novo* can be reconciled.

In *Paul v Royal Hampton NHS Trust* [2020] EWHC 1415 (QB) the Claimants are children who suffered psychiatric injury after they witnessed their father collapse and die of a heart attack. The father had attended hospital about 14 months earlier, with symptoms that should have prompted the hospital to diagnose and treat his coronary heart disease, in which case the heart attack would not have occurred. The Defendant admits negligence and that the Claimants fulfilled all of the control mechanisms for secondary victim claims, apart from one key ingredient: the Defendant denied that the Claimants' father's heart attack was an "event" which could found the basis of a claim.

By analogy with the facts in Walters, the fact that the negligence occurred earlier than the first manifestation of the damage it caused would not appear to be a bar to the claim. On the other hand, what about *Taylor v A Novo*? As the Claimants did not witness the negligent event (i.e. the misdiagnosis in hospital), and only a consequence of that negligence, then surely the claim should fail?

The Defendant, before Master Cook, applied successfully to strike out the claim. However Chamberlain J has reinstated it. Individual practitioners may have their own views about whether or not this is a correct decision on the current state of the law, but it would seem on the face of it to be a very harsh application of the secondary victim control mechanisms to shut out these Claimants, when the heart attack was the first manifestation of damage caused by the Defendant's negligence and no one could possibly have known that a cause of action existed before it happened.

In her article below, Laura Johnson (who successfully argued that the claim should be re-instated) explains the reasoning behind Chamberlain J's decision.

PAUL V ROYAL WOLVERHAMPTON NHS TRUST: SOME WELCOME CLARITY ON PROXIMITY IN SECONDARY VICTIM CLAIMS

LAURA JOHNSON

Introduction

As Ed Bishop QC discusses in his article, secondary victim claims can be difficult for claimants to succeed in. They are an exception and, as a result, heavily restricted by the control mechanisms set out in *Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310. They have long posed particular difficulty in clinical negligence cases where there is delay between breach of duty and the injury to the primary victim that is later witnessed by a loved one. In clinical cases the breach of duty is often one of omission, where there is no "event" of negligence to be witnessed. Instead many cases arise out of a failure to diagnose or treat a condition, the consequences of which may not become

evident for weeks, months or even years. The application of the *Alcock* criteria, in particular the meaning of the requirement for proximity in time and space to the "event", created in the very different context of a conventional "accident" case has led to lively arguments in the courts for many years.

In *Paul* Chamberlain J has provided some welcome clarity on several important points:

- The "event" for the purposes of the *Alcock* control mechanism of proximity in time and space does not have to be one that is external to the primary victim, but only to the secondary victim;

- The event does not have to be proximate in time to the breach of duty; and

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- Secondary victims do not have to be present at the scene of the tort.

Chamberlain J reached these conclusions when considering the appeals of Saffron and Mya Paul whose secondary victim claims were struck out by Master Cook in November 2019. Chamberlain J concluded that Master Cook was wrong to strike out the claims and they should proceed to trial.

The decision

Saffron and Mya Paul are the daughters of Mr Parminder Singh Paul and Mrs Balbir Kaur Paul. On 9 November 2012, Mr Paul was admitted to New Cross Hospital in Wolverhampton, part of the Defendant Trust, after complaining of chest and jaw pain. He was discharged on 12 November 2012 after various tests and investigations. More than 14 months later, on 26 January 2014, while out on a shopping trip with Saffron (then 12) and Mya (then 9), he collapsed and died from a heart attack.

Mr Paul's heart attack was caused by ischaemic heart disease and occlusive coronary artery atherosclerosis. The Claimants' case is that the failure to diagnose these conditions during Mr Paul's stay in hospital in November 2012 was negligent. In particular, it is said that the Hospital should have performed coronary angiography on Mr Paul. This, it is said, would have revealed significant coronary artery disease, which could and would have been successfully treated by coronary revascularisation. The Claimants say that, had that occurred, Mr Paul would not have suffered a cardiac event in January 2014; and Saffron and Mya would not have suffered the psychiatric injuries which they say were caused by witnessing his collapse and death. It is the Claimants' pleaded case that Mr Paul's collapse from a heart attack on 26 January 2014 was "the first manifestation of the Defendant's breach of duty".

The Defendant Trust applied to strike out Saffron and Mya's secondary victim claims on the basis that it did not owe them a duty of care. The appeal was heard by Master Cook late last year.

The Trust argued before Master Cook and on appeal that the claims could not satisfy the criteria of proximity in time and space to the relevant "event", one of the control mechanisms that must be met in order to establish a duty of care in a secondary victim claim. It was said that in accordance with relevant authorities it was necessary to identify some external traumatic event in addition to the primary consequence of injury or death and that, in the circumstances of these claimants, there was no relevant event at all. It was also submitted that there needed to be a "proximate connection" between the negligence and the shocking event. In this case the Defendant submitted that there was a completed tort at the time of the admission in November 2012 and therefore the heart attack 14 months later could not itself qualify as an "event". In support of these submissions the Defendant relied upon *Taylor v Somerset Health Authority* [1993] PIQR 26 and *Taylor v A. Novo* (UK) Ltd [2014] QB 150, which it argued provided a complete answer to the claims.

The Appellants did not accept the Defendant's interpretation of the effect of the two Taylor cases and instead relied upon the Court of Appeal decision of *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792 as being 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.

In his judgment on appeal Chamberlain J identified the key question as being "whether Mr Paul's collapse from

a heart attack, 14½ months after the allegedly negligent treatment, is capable of constituting a relevant "event". He identified three possible reasons why not:

> (1) That the "event" has to be synchronous, or approximately synchronous, with the negligence with gives rise to it. This was not argued by the Defendant and Chamberlain J observed that the Defendant was correct not to "and the reason why is relevant to the arguments [the Defendant] did advance. Although *McLoughlin* and *Alcock* were both cases where the negligence was close in time to the "event" there is nothing in any of the House of Lords authorities to suggest that this must invariably be so. Lord Oliver said in *Alcock* at 416 that the "temporal propinquity" required was between the psychiatric injury and "the event caused by the defendant's breach of duty to the primary victim" (emphasis added), not the breach of duty itself".
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> (2) That liability depends on there being a negligent act rather than an omission. Again Chamberlain J noted that the Defendant did not advance this argument and was right not to do so. He said there is no reason of principle why an omission should be treated any differently and observed that Walters was a case of negligent omission.
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> (3) That the Claimants were absent from the "scene of the tort". "This was very much part of [the Defendant's] submissions. In my judgment, however, it takes matters no further. In "accident" cases, like *McLoughlin*, *Alcock* and *Taylor v A. Novo*, where the breach of duty and the damage cased are coincident in time and place, the "scene of the tort" is also the scene of the negligence. When the negligence and the damage are separated, and assuming that there is no requirement for the negligence and the damage to be synchronous, the "scene of the tort" can only mean "the scene where damage first occurred". In the tort of negligence, this is the point when the tort becomes actionable or complete."
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> "It was [the Defendant's] case that the tort here became actionable at the time of or immediately after Mr Paul's admission to hospital in November 2012, because the negligent failure to diagnose Mr Paul's condition would at that point have set in train, or failed to arrest, the biological processes that eventually led to his death. [The Defendant] submitted that *Dryden v Johnson Matthey* showed this to be so even if, as pleaded in the Particulars of Claim, Mr Paul's collapse was the "first manifestation of the Defendant's breach of duty". The difficulty with this submission is that *Dryden v Johnson Matthey* shows only that non-manifest biological changes can constitute actionable damage. The question whether, in this case, the Defendant's negligence caused actionable damage prior to Mr Paul's collapse is a question of fact, which would no doubt have to be determined on the basis of expert evidence. At this stage, Ms Johnson's position is that there is no indication of any damage prior to the moment of Mr Paul's heart attack. For the purposes of this strike out application, I have to proceed on the factual basis most favourable to the Claimants, so I have to assume that the cause of action did not accrue – in other words, there was no completed tort – until Mr Paul's collapse on 26 January 2014. On this assumption, the "scene of the tort" was the pavement where, on 26 January 2014, Mr Paul collapsed and died. The Claimants were present at that scene."

Chamberlain J went on to acknowledge that the argument did not end there for either party. It was the Defendant's argument that even if the court accepted this proposition, the claim could not succeed. Conversely, it was the Claimants' argument that the claim could succeed even if it transpired that there had been damage prior to the heart attack on 26 January 2014.

Chamberlain J rejected the Defendant's argument that it was not foreseeable that psychiatric injury would result from witnessing the consequence many months later of a negligent omission in the clinical context. "I would regard it as eminently foreseeable that a negligent failure to diagnose and treat a heart condition might result in a sudden and shocking event that, if witnessed by close family members, might occasion psychiatric damage."

Chamberlain J also rejected the Defendant's argument

that the need to show that the shock was caused by the "fact and consequence" of the Defendant's negligence "entailed a requirement that the secondary victim must, at the time of the "event", perceive not only the injury to the primary victim but also the fact of its causation by the defendant's negligence. I can see no justification for any such requirement and no support for it in the authorities."

Chamberlain J went on to consider what was described as the "centrepiece" of the Defendant's argument: that the two *Taylor* cases were a complete answer to the claims. He rejected the argument that it was a requirement as a result of the *Somerset* case that the "event" had to be external to the primary victim. If that was the case it would be impossible for a claimant to recover damages arising out of a negligent omission and *Walters*, a case arising out of negligent omission, would be wrongly decided. Instead Chamberlain J concluded that the reference to "an external, traumatic, event caused by the defendant's breach of duty which immediately causes some person injury or death" in *Somerset* was to an event "external to the *secondary* victim". He distinguished *Taylor v A Novo* on the basis that the ratio of the case was that where the defendant's negligence results in an "event" giving rise to injury in a primary victim, "a secondary victim can claim for psychiatric injury only where it is caused by witnessing *that event* rather than any subsequent, discrete event which is the consequence of it, however sudden or shocking that subsequent event may be." The reference to "accident" cases as ""[a] paradigm example" of those in which a claimant can recover damages as a secondary victim" was a "careful formulation" that allowed for "non-paradigm cases where there is no "accident", but some other kind of event – such as in *Walters*". "The passage at [35] in which *Walters* is distinguished appears to me to recognise that an event which is external to the secondary victim, but internal to the primary victim, could in principle qualify if it is sufficiently sudden and horrifying and leads immediately or "seamlessly" to death or injury in the primary victim."

This analysis led Chamberlain J to conclude that the Master was wrong to decide that the claims are bound to fail on the facts pleaded.

Although this was sufficient to demonstrate that the appeal must be allowed, Chamberlain J went on to consider the Appellants' argument that it was possible for the claim to succeed even if the negligent failure to diagnose had given rise to actionable damage prior to Mr Paul's collapse on 25 January 2014. Chamberlain J accepted that liability would be precluded by *Taylor v A. Novo* if there had been a relevant "event" prior to the collapse in January 2014. In that case the collapse would be merely the consequence of the earlier event caused by the defendant's negligence and not the event itself. However, on the pleaded case, even if actionable damage had been sustained prior to January 2014, there was nothing that could naturally be described as an "event" before the heart attack and collapse.

Chamberlain J went on to say: "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"." This was consistent with *Walters*. "I would therefore hold that the principle in *Taylor v A. Novo* is no bar to recovery in this case if it is shown that Mr Paul's collapse from a heart attack on 26 January 2014 was the first occasion on which the damage caused by the hospital's negligent failure to diagnose and treat his heart condition became manifest." The Defendant's floodgates argument in respect of this was rejected for two reasons. First, these types of argument are best addressed when the control mechanisms are set, not when they are applied. Second, Chamberlain J rightly recognised that overcoming all of the hurdles of the *Alcock* control mechanisms is not easy for claimants, particularly in a clinical setting.

Conclusion

Those acting for claimants often approach secondary victim claims with a degree of caution and are right to do so because the *Alcock* control mechanisms pose a fairly formidable set of hurdles to overcome to bring a successful claim. It is also a fair observation that there are few recent reported cases concerning secondary victim claims that have succeeded, although many of those cases faced particular difficulties on their acts in overcoming other aspects of the *Alcock* control

mechanisms.

Paul provides grounds for optimism however that cases that do not arise out of a conventional accident "event", properly considered on their facts and set against the criteria, may be pursued. As Chamberlain J comments in his judgment when discussing the application of the controls to the facts of a particular case:

"… there is no constitutional reason why the courts should not apply their usual analogical tools. More specifically, there is no reason to favour a conservative posture in which liability is only accepted where it has already been found to exist on indistinguishable facts. There is nothing to inhibit the courts from aiming for maximal coherence in the principles which govern the circumstances in which the existing control mechanisms will be satisfied. In doing so they are bound by the rules of precedent, but are otherwise unconstrained."

Chamberlain J was also unpersuaded by "floodgates" arguments, recognising the cumulative difficulties posed by the Alcock criteria and observing that these types of arguments are better considered when setting criteria rather than when applying them.

Chamberlain J's judgment provides the most authoritative determination so far of the application of the control of proximity in time and space to cases where there is a delay between the breach of duty and the shocking "event" that follows, applying common sense to that analysis to answer the difficulties posed by the cases of Walters and Taylor v A Novo.

Laura Johnson of 1 Chancery Lane acted for the Appellants, instructed by Phil Barnes, Head of Medical Negligence at Shoosmiths LLP

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