Secondary Victim Claims - Paul & Others v The Royal Wolverhampton NHS Trust

Published 17 June 2020

The decision in the *Paul* appeal was handed down last week. Mr Justice Chamberlain found that Master Cook was wrong to strike out the Claimants' claims in November 2019 and allowed their appeal against strike out on the basis that they were sufficiently proximate to the "relevant event" to be owed a duty of care. They were therefore entitled to bring claims as secondary victims for the psychiatric injuries they sustained witnessing the death of their father, Mr Paul.

This case goes to the very heart of the tort law on secondary victim claims and departs from the proximity requirements laid down in *Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310, *Taylor v Somerset Health Authority* [1993] PIQR 26, *Taylor v A. Novo (UK) Ltd* [2014] QB 150 and most recently *Purchase v Ahmed [2020].*

Case Law

Alcock is clear that, to succeed in a secondary victim claim, the claimant must be present at the incident or its immediate aftermath. In clinical negligence the aftermath does not always immediately follow the incident and the proximity requirement is a huge hurdle for many claimants to overcome. The requirement has been criticised as being arbitrary and unfair and has been challenged time after time in the Courts.

In *Taylor v A. Novo* the Court found that a period of 3 weeks between the death and injury was too great a period whereas in *Ronayne* v *Liverpool Women's Hospital NHS Foundation Trust* (2015) the Court held that a period of 10 days was too long. In *Purchase* DJ Lumb went one step further and struck out the Claimant's claim following a time period of 54 hours between the negligence and death.

The only way around the requirement, as found in *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, is if there is a "seamless tale of events". In this case the Court found a 36 hour period to constitute a single horrifying event. This may be decide differently now given what has followed.

The Facts of *Paul*

The Claimants (both minors) are the daughters of the Deceased. The Deceased was admitted to the New Cross Hospital on 9 November 2012 with chest and jaw pain. Following investigations he was discharged 12 November 2012. Just over 14 months later, on 26 January 2014, whilst out with the Claimants (then aged 9 and 12) he collapsed and died from a heart attack.

It is the Claimants' case that the treatment the Deceased received in November 2012 was negligent and, had he been treated correctly, he would not have suffered the fatal heart attack. In turn the Claimants would not have witnessed his death and suffered psychiatric injury. They pleaded the heart attack was "the first manifestation of the Defendant's breach of duty" and they were therefore sufficiently proximate. They relied upon *Walters* and submitted that the "relevant event" could be the event caused by the negligence (the heart attack and Mr Paul's death), as opposed to the act of negligence (the treatment received from 9-12 November 2012).

casein response the Defendant argues that that the Claimants did not satisfy the proximity requirements laid down in *Alcock*. In particular, the Claimants were not sufficiently proximate in time and space to the 'relevant event', being the alleged negligence in November 2012 to which there was no immediate aftermath. They submitted that the tort became actionable at that point and relied on *Taylor v Somerset* and *Taylor v Novo* which affirmed the position in *Alcock*. The Defendant submitted that to allow the claim would open the floodgates to many more claims.

Master Cook found that Mr Paul's "*…death 14 ½ 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...*".

Judgment and issues for consideration

Chamberlain J concluded Master Cook was wrong in striking out the claim and that the "relevant event" and "scene of the tort" was the Deceased's collapse and death on 26 January 2014.

It is worth looking at some salient passages from the judgment:

"When the negligence and the damage are separated, and assuming 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

context of the tort of negligence, this is the point when the tort becomes actionable or complete".

He concluded:

"On the facts pleaded, it was a sudden shocking event, external to the secondary victims, and it led immediately or very rapidly to Mr Paul's death. The event would have been horrifying to any close family member who witnessed it, and especially so to children of 12 and 9. 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 the damage is cause, 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".

Chamberlain J was satisfied it was foreseeable that the negligence could result in a sudden and shocking event which, if witnessed by close family members, could result in psychiatric injury. He rejected the Defendant's argument that the Claimants must at the time of the "relevant event" perceive the injury and fact of causation, and rejected the Defendant's floodgate argument, recognising that the *Alcock* criteria provide a difficult hurdle for claimants to overcome.

Chamberlain J considered whether it was possible for the claim to succeed if the Defendant established that the Deceased sustained injury or damage prior to his heart attack and death. He accepted that, on the basis of *Taylor v Novo,* there would be no liability if there had been an earlier "relevant event". In that instance the heart attack and death would be a consequence of the earlier event. In the pleaded case there was however no evidence of an earlier event.

He was of the view if it were necessary to identify a point after which the consequences of an act or omission could not give rise to liability the "most obvious candidate" is the point the damage manifests itself to the primary victim.

We are not of the view that witnessing *any* death many months after a negligent act will enable a claimant to bring a successful claim as a secondary victim. The key point appears to be when the consequences of the negligence first become manifest. The breach of duty in *Paul* was in November 2012; the causation was in 2014 (cardiac arrest). It was in 2014 when the *tort was complete*.

The Future

Is to too early to say whether the Defendant will appeal the decision of Chamberlain J or whether this case will progress to trial. Only time will tell whether the Claimants will be awarded damages and the way paved for further claims which, prior to the *Paul*, would have been struck out. Whilst we recognise that the case has not yet gone to trial, and instead the decision relates to a strike out, the decision nevertheless provides a remarkable departure from the previous case law.