The Law on Secondary victims in Clinical Negligence cases

INTRODUCTION

1. To use the words of Lord Steyn in *White v Chief Constable of South Yorkshire Police*, the law on secondary victims is "*a patchwork quilt of distinctions which are difficult to justify*".

2. The law on secondary victims is not straightforward and somewhat unprincipled largely as it appears to have been shaped by a series of policy choices rather than legal principles.

3. In this talk, I will discuss the current law on secondary victims in clinical negligence cases and, in particular the conjoined cases of Paul, Polmear and Purchase which have been appealed to the Supreme Court.

DUTY OF CARE AND THE CONTROL MECHANISMS LAID DOWN IN ALCOCK

4. First, as we know, a duty of care is not normally owed by a medical professional to someone who is not her patient. (see for example *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373).

5. There are exceptions, however. This is because the law recognises that a duty of care can be owed to someone who suffers psychiatric injury as a result of witnessing injury caused to others in certain limited circumstances.

6. The claim is said to be for "nervous shock" and the person is defined in law as a "secondary victim." The Courts have consistently stressed that proximity is particularly important in claims by secondary victims (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC310 is the foundation of the law in this area).

7. *Alcock* lays down five "control mechanisms" in determining whether a person is a "secondary victim." These "control mechanisms" have been considered important and necessary, to guard against widespread liability arising from accidents. In *Alcock* it was held that a duty of care was not owed to people who watched on television at home as events unfolded at Hillsborough stadium in April 1989 even when they knew, or strongly suspected, that a close friend or relative was caught up in the disaster.

8. It was said in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC455 that the "control mechanisms" in *Alcock* are now so firmly established that only legislation can supplant them.

9. The five "control mechanisms" identified by the court in Alcock are that:

(i) there require to be close ties of love and affection and a marital or parental relationship between the claimant and the victim;

(ii) the injury requires to have been caused by a sudden and unexpected shock to the claimant's nervous system;

(iii) the claimant was present at the scene or arrived in the immediate aftermath;

(iv) the injury resulted from witnessing the death, or extreme danger to, the primary victim; and

(v) there is a close temporal relationship between the incident and the injury for which damages are claimed.

ALCOCK APPLIES IN THE CONTEXT OF CLAIMS ARISING OUT OF CLINICAL NEGLIGENCE

10. **In the recent case of Paul v Royal Wolverhampton NHS Trust the Court of Appeal confirmed that the five elements required to establish legal proximity in secondary victim cases – as per Alcock - apply as much to clinical negligence cases as they do to accident cases.**

11. The extent to which past cases can assist in answering the question of whether a claimant is likely to be deemed a secondary victim by the Court is limited. This is because the particular facts and circumstances in each case require to be assessed to determine whether there is a relationship of sufficient proximity so as to give rise to a duty of care to that "second victim." (*W v Essex County Council* [2001] 2 AC 592).

12. The difficulty is exacerbated in clinical negligence cases because the significant decisions of the House of Lords in this area and the decision of the Court of Appeal in *Taylor v Novo* (which I will come on to) were cases about horrific events caused by accidents rather than clinical negligence.

TAYLOR V NOVO

13. In *Taylor v Novo* (Crystal Taylor v A. Novo (UK) Ltd [2013] EWCA Civ 194). It was held that the Claimant lacked legal proximity because she was not present at the time of the accident (which caused the death) that had occurred some 3 weeks prior. Her mother had been injured at work and then died in the presence of her daughter, the claimant, 3 weeks later. The Court of Appeal held that the third control mechanism in *Alcock* was not fulfilled. The claimant had not witnessed the accident or its immediate aftermath.

14. In *Taylor,* it is clear that the Court was concerned that if it allowed the claim that the 'secondary victims" doctrine could be difficult to contain. For example, would the doctrine then extend to claimants who had witnessed collapse and death of a

loved one many years after the original negligence which caused the injuries resulting ultimately in death.

NORTH GLAMORGAN NHS TRUST V WALTERS [2002] EWCA Civ 1792

15. A clinical negligence case in which secondary victim status was found to be established is *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792 – decision of Court of Appeal.

16. In this case a baby had a seizure and was admitted to hospital with his mother. The mother shared a room with her baby in hospital and was awoken by the baby having a fit. The baby was misdiagnosed and there was a delay in giving treatment for brain damage. The mother was told the brain damage was severe and it was recommended that her baby's life support be terminated.

17. The Court of Appeal regarded this as a single horrifying event in which "*there was an inexorable progression from the moment when the fit causing the brain damage occurred as a result of the failure of the hospital properly to diagnose and then treat the baby [to] the dreadful climax when the child died in her arms." The Court went on to say: It is a seamless tale.." as a result of which the mother "…reeled under successive blows [to her nervous system*]."

A SINGLE HORRIFYING EVENT

18. **The phrase "A single horrifying event"** (a continuum) is key. Whether you are pursuing a claim for compensation for secondary victims or defending, the current persuasive authority from the Court of Appeal is that where it can be said that psychiatric injury has occurred to a person as a result of witnessing injury caused to their loved one by a single horrifying event that injury should sound in damages.

19. But cases in which a single horrifying events exist must be rare. By the nature of medical treatment, people receiving it do not usually have their loved ones present, for example surgery, diagnostic tests including scans, physical examinations. It is then difficult to argue that the third control mechanism in Alcock, (ie (iii) the claimant was present at the scene or arrived in the immediate aftermath) is fulfilled.

20. Within the last year the Court of Appeal required to consider the issue of whether there was sufficient *proximity* between the victims and the 'relevant event' which had occurred sometime after the date of alleged negligence.

PAUL v THE ROYAL WOLVERHAMPTON NHS TRUST

21. The conjoined cases of Paul v The Royal Wolverhamptom NHS Trust ('Paul'); Polmear v The Cornwall Hospital NHS Trust ('Polmear'); and Purchase v Ahmed ('Purchase') all related to psychiatric injury to family members whose loved ones had died as a result of alleged clinical negligence.

22. In these conjoined appeals, the court had to decide whether a claimant, who sustains psychiatric injury as a result of witnessing the death or other horrific event suffered by a close relative as a result of earlier clinical negligence, can claim damages for that psychiatric injury. The question turns on the relevance of any time intervals between the clinical negligence, the damage caused by it, and the horrific event that ultimately causes the psychiatric injury to the claimant.

23. In the case of *Paul*, Mr Paul's daughters suffered psychiatric injuries after witnessing him suffer a heart attack. Mr Paul fell, hitting his head and causing a bleed. The paramedics were unable to resuscitate him and he tragically died. A year prior, Mr Paul had attended hospital with chest pain and the Claimants argued that had Mr Paul's chest pain been properly investigated at the time, he would not have suffered the heart attack.

24. In *Polmear,* Miss Polmear was misdiagnosed and as a result collapsed six months later. Her parents witnessed this and attempted CPR which was unsuccessful. The parents suffered PTSD and depression.

25. In *Purchase*, Ms Purchase was misdiagnosed with a Respiratory Tract Infection when she actually had Pneumonia. Two days later, her mother found her unconscious with her phone in her hand. Efforts to resuscitate were unsuccessful. Her mother discovered she had a voicemail from her daughter which recorded her last minutes. This caused her to suffer PTSD, anxiety and depression.

26. The task for the Court of Appeal in these conjoined cases was how to apply *Alcock* and *Novo* (which are accident cases) to clinical negligence claims where a delay exists between the negligent act and the shocking event. This was the same point that had to be determined in *Taylor v Novo* …..is a delay between the negligent act or omission and the secondary victim's perception of a horrific event, fatal to a claim for damages? The difference between Paul/Polmear and Purchase on the one hand and Novo was that the Court of Appeal in Paul/Polmear and Purchase had to determine the issue in the context of clinical negligence.

27. Parties agreed in Paul/Polmear and Purchase that all requirements set out in Alcock were satisfied save for how to interpret the third element; namely the victim being personally present at the scene of the accident.

28. The Court of Appeal held that the current binding authority of *Novo* did not allow the shocking event to be removed in time and space from the accident or negligence. You'll recall that *Novo* is the case where a mother who had been injured at work 3 weeks earlier collapsed and died in the presence of her daughter.

29. Bound by Novo, the Court in Paul/Polmear and Purcahse said, where the psychiatric injury was caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event, a claim cannot succeed.

30. In delivering the judgement of the Court of Appeal, the Master of the Rolls said:

    "For a secondary victim to be sufficiently proximate to claim for psychiatric injury against the defendant whose clinical negligence caused the primary victim injury, the horrific event cannot be a separate event removed in time from the negligence. If the negligence and the horrific event are part of a continuum as seems to me the best possible explanation of Walters[1] – single horrifying event we talked about earlier, there is sufficient proximity".

31. As a result, all three claims in Paul/Polmear and Purchase were struck out on the basis that the passage of time between the negligence and the shocking event precluded the Court from establishing legal proximity.

32. From his judgment, the Master of the Rolls was clearly uncomfortable with the application of *Novo* although he considered it binding. He said:

    " Novo is binding authority for the proposition that no claim can be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event. I accept that, although there is no logical reason for these rules, they are the way Auld J in Somerset and the Court of Appeal in Novo built upon the five elements and adapted them to the clinical negligence context. If I were starting with a clean sheet, I can quite see why secondary victims in these cases ought to be seen to be sufficiently proximate to the defendants to be allowed to recover damages for their psychiatric injury. Since, however, this court is bound by Novo , it is for the Supreme Court to decide whether to depart from the law as stated by Lord Dyson in that case"

    and in his concluding paragraph opines:

    "I have … reservations about whether Novo correctly interprets the limitations on liability to secondary victims contained in the five elements emerging from the

[1] It will be recalled that *Walters* is the case I mentioned earlier where the baby had been misdiagnosed following a fit in the presence of the mother)

House of Lords authorities… I would be prepared to grant permission to the claimants to appeal to the Supreme Court …"

33. Permission has now been granted and it is hoped that the Supreme Court should decide the case within the next 6 months or so.

CONCLUSION

34. The conjoined appeals in Paul are all tragic cases, and engender huge sympathy for the secondary victims. However, as Lord Ackner said in Alcock: "if sympathy alone were to be the determining factor in these claims they would never have been contested." The House of Lords made clear in Alcock, there must be boundaries to recoverability by secondary victims. Without such boundaries, defendants are potentially exposed to large numbers of claims arising from one act of negligence.

35. However, the difficulty for judges is to determine where those boundaries should be set. The difficulty for legal advisers on the law as it currently stands is that, as the case law has been shaped by policy decisions, and perhaps understandably concern over the floodgates argument, rather than discernible legal principle, it is difficult to advise on or predict what a Court might decide.

36. It is also difficult perhaps for claimants' legal advisers to explain to their client why there is this distinction between a single horrifying event or continuum which allows damages to be recovered and what has been termed a separate horrific event. It might be easier to explain where there is an obviously long gap, but on one view the time in Taylor, of 3 weeks was not long.

37. I want to pick up on the Master of the Rolls comments in *Paul* where he said:

" If I were starting with a clean sheet, I can quite see why secondary victims in these cases ought to be seen to be sufficiently proximate to the defendants to be allowed to recover damages for their psychiatric injury"

38. In other words, he seems to be saying that if he had not considered himself bound by Novo he would have awarded damages to the secondary victims in Paul (where there was a space of 1 year) in Polmear where there was 6 months and in Purchase just 2 days.

39. Interestingly, the Master of the Rolls in *Novo,* Lord Dyson, said that it was important to strive for the result that an "*ordinary, reasonable person*" would understand:

"In this area of the law, the perception of the ordinary reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so far as possible, reflect what the ordinary reasonable person would regard as acceptable."

40. The Court of Appeal in Paul/Polmear and Purchase seems to be saying that the ordinary reasonable person would regard it acceptable for the claimants in those cases to have been successful.

41. It remains to be seen whether the Supreme Court will agree or whether it will decide that Novo should continue to apply in clinical negligence cases. It might say in its in judgement that as this area of law is so bound up with policy decisions that it for Parliament to legislate here. To date, there seems to have been a reluctance by Parliament to do this.

42. In Scotland, less than 10 years ago, notwithstanding repeated judicial criticism of the current law, a proposal for legislative reform in Scotland as proposed by Scottish Law Commission Report (2004) was rejected by the Scottish Government in December 2013. See Civil Law of Damages: Issues in Personal Injury Scottish Government Response to the Consultation, December 2013, at p.21.

43. If Parliament was going to legislate, what legislative provisions might be appropriate? I suppose it could decide that rather than limiting these claims on the basis of the time between the alleged negligence and the injury, they could for example provide that secondary victims claims could only be made by particular categories of relatives such as spouses and parents. Most of us are familiar with the terms of the Damages (Scotland) Act 2011 which allows only certain relatives to claim including parents, grandparents, siblings, children but not for example aunts or uncles. That might be a more readily understandable limit for the ordinary, reasonable man to understand than the requirement that there be a single horrifying event.

Jennifer Nicholson-White
Ampersand
Advocate
Edinburgh
29 September 2022