'Seconds Out!': Secondary Victim Claims Arising from Clinical Negligence to go to the Court of Appeal

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Claims by secondary victims arising from clinical negligence have for many years been a battleground between Claimants and the NHS, particularly where the psychiatric damage that is the subject of the claim occurs many months after the purported breach of duty in respect of the primary victim. Defendants have routinely fought hard when it comes to these types of claim and it is customary for applications to strike out such claims to be made on the basis that there is no proximity between the secondary victim, the Defendant and the Defendant's breach of duty.

On 5 February 2021, Master Cook handed down a further judgment on this issue: *Polmear v Royal Cornwall Hospitals NHS Trust* [2021] EWHC 196 (QB) ('*Polmear*'), wherein the Master dismissed an application to strike out the claims of both Claimants who allege that they suffered psychiatric injury secondary to the Defendant's admitted negligence towards their daughter, Esmee, who sadly died on 1 July 2015. However, whilst dismissing the application and noting the complex state of the law on this issue, the Master also gave the Defendant permission to appeal the matter directly to the Court of Appeal.

This blog looks at some of the recent decisions of relevance to secondary victim claims including the latest decision of *Polmear*.

Taylor v A. Novo

The root of arguments pertaining to liability to secondary victims in these cases has long been the Court of Appeal's decision in *Taylor v A. Novo (UK) Ltd* [2013] 3 WLR 989 ('*Taylor*'). Here, proximity was considered within the context of an accident at work. Mrs Taylor sustained a head injury due to admitted negligence and, some 20 days later, she collapsed and died at home due to a deep vein thrombosis and consequent pulmonary emboli which arose from the head injury. Her collapse, and death, was witnessed by the Claimant, her daughter, who sustained PTSD as a consequence. To succeed it was confirmed that the Claimant had to satisfy the seven-stage requirements set down in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 ('*Alcock*'). The Defendant argued there was no proximity. The Court of Appeal made it clear at [27] that:

> "*... in secondary victim cases, the word "proximity" is also used in a different sense to mean physical proximity in time and space to an event. Used in this sense, it serves the purpose of being one of the control mechanisms which, as a matter of policy, the law has introduced in order to limit the number of persons who can claim damages for psychiatric injury as secondary victims or to put it in legal terms, to denote whether there is a relationship of proximity between the parties. In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity.*"

Lord Dyson MR dismissed the claim by Mrs Taylor's daughter on the basis that there was insufficient proximity in time, between the negligent 'event', and the damage witnessed by Mrs Taylor. There was the plain concern that to do otherwise would be to potentially allow damages for secondary victims who witness events months, and even years, after the negligence occurred; and that this would offend the general policy considerations which had been acknowledged and incepted in *Alcock*. As such, the conclusion was that the death of Mrs Taylor was not a 'relevant event' for the purposes of deciding the proximity question and thus her daughter's claim was precluded.

Paul v The Royal Wolverhampton NHS Trust

In *Paul v The Royal Wolverhampton NHS Trust* [2020] PIQR P19 ('*Paul*'), the Claimants suffered psychiatric injury as a

result of the death of their father which occurred well over a year after the admitted negligence of the Defendant. Death was caused by ischaemic heart disease and occlusive coronary artery atherosclerosis which the Defendant had failed to diagnose some 14 months earlier when symptoms began to appear. At first instance, Master Cook struck out the claim on the grounds that there was insufficient proximity between the negligence and the damage but that decision was overturned by Chamberlain J, who discussed *Taylor* and determined its consequences thus at [73]:

> "*In my judgment, the ratio of* Taylor v A. Novo *is that, in a case 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. It is true that, at [30] of his judgment (see [29] above), Lord Dyson reasons that it would be undesirable to allow recovery in a case where "death had occurred months, and possibly years, after the accident". But this is a concern about delay between "the accident" (i.e. the event) and its later consequence. As I noted at [63] above, there is nothing to suggest that there would be any reason to deny recovery simply because the accident or event occurred months or years after the negligence which caused it.*"

Interpreting *Taylor* in that way, Chamberlain J further held at [74] that it would be appropriate for the law 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.*"

On the particular facts of *Paul*, therefore, Chamberlain J concluded as follows at [75]:

> "*... unlike in* Taylor v A. Novo*, there was on the facts pleaded only one event: Mr Paul's collapse from a heart attack on 26 January 2014. On the facts pleaded, it was a sudden 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 14½ 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.*"

Polmear

(i) The Facts

In August 2014, the Claimants had taken their daughter, Esmee, to her GP following episodes where she could not catch her breath, appeared pale and then later turned blue. They had been increasing in intensity and severity and the Claimants had become increasingly concerned. A referral was made to the Paediatric Department of the Defendant's Hospital and it was decided that Esmee ought to undergo ambulatory ECG monitoring for a 48 hour period. During that period Esmee had no attack and the conclusion was that symptoms were related to exertion only. However, Esmee's attacks continued and so she was again taken to the GP in April 2015 at which a second paediatric opinion was requested.

Then, on 1 July 2015, whilst at school, Esmee had a further attack as a result of which she passed away. During the commencement of the attack both Claimants had attended the school because of concerns about her condition and both Claimants were present when paramedics attended and attempted resuscitation which was unsuccessful. It transpired that Esmee had been suffering from Pulmonary Veno-Occlusive Disease, and it was this which had ultimately caused her death.

Both Claimants subsequently developed significant psychiatric injury. The Defendant admitted that they had failed to properly investigate Esmee's symptoms including referral for paediatric cardiology or respiratory opinion and that with appropriate referral a diagnosis would have been made by mid-January 2015.

(ii) The Defendant's Application

The Defendant applied to strike out of both claims on the basis that Esmee's death had come many months after the

admitted failure to diagnose. As such, applying *Taylor*, there was insufficient proximity between the breach and injury to give rise to a cause of action since actionable damage had already been sustained well before that point. Esmee's death was therefore a discrete event and not a 'relevant event' such as to allow liability to a secondary victim.

The application was resisted by the Claimants who argued as follows:

- The persisting episodes which occurred after the date by which a diagnosis ought to have been made were 'transient' and did not constitute manifest damage as a result of the Defendant's negligence for the purposes of a cause of action.
- Alternatively, if each episode did constitute 'damage', then each episode constituted its own cause of action, and that included the one which occurred on the date of death for which there was clear proximity.

(iii) The Decision of Master Cook

Master Cook held that he was bound by the decision of Chamberlain J in *Paul* and particularly [75] of his judgment (quoted above). The Master held that the episodes between the date of breach and Esmee's death were not 'transient' but nonetheless took the following view at [43]:

> "*On the facts pleaded, Esmee's collapse was a sudden event, external to the secondary victims, and it led very rapidly to her death. The event would have been horrifying to any close family member who witnessed it, and especially to the parents. In the circumstances the question is why should the fact that Esmee had suffered non-fatal episodes on previous occasions rule out the secondary victim claims of her parents. It seems to me that Esmee's final episode can be appropriately described as a fact and consequence of the Defendant's negligence. Mr Pitchers QC's submission that each episode should be treated as constituting "damage" to Esmee, so that each would constitute its own cause of action and not be a bar to recovery based upon the events of 1 July 2015 should be seen in this light.*"

Accordingly, the attack on 1 July 2015 was, by and of itself, a 'relevant event' even though it did not immediately coincide with, or precede, the first actionable damage to Esmee. The Defendant's application was therefore refused.

Discussion

Master Cook took the very unusual step of giving permission to appeal to the Court of Appeal pursuant to CPR 52.23. The "*compelling reason*" required for this was the lack of clarity in the law, the slightly different facts to *Paul* (including symptoms and actionable damage prior to the sudden death) and the fact that a number of claims have been stayed pending the Court of Appeal's upcoming hearing in *Paul*.

Hence, we must now wait for further input from the Court of Appeal, with Master Cook clearly having in mind that the two cases should be heard together. This is likely to be a seminal appeal with profound consequences for secondary victim claims in clinical negligence contexts where, in cases arising from a failure to diagnose or treat, there will very frequently be a time lag between the breach of duty and the serious or fatal injury to the primary victim that is the typical foundation for a secondary victim claim. Such a time lag allows for potential secondary victims to come into the equation as they physically gravitate towards loved ones and administer care. By so doing, the opportunity for them to witness a horrifying event which may befall the primary victim as a consequence of the Defendant's original negligence is very real.

It is also plain that policy is most likely going to have a large say in the determination of the appeals in *Paul* and *Polmear*. At present, the dice is arguably loaded against the Claimants given the clear direction of policy which was outlined in *Alcock*. But the alternative analysis that 'events' are, in reality, distinct causes of action with discrete manifestations of damage, each of which has the potentially to qualify as a relevant event if sufficiently horrifying, is potentially a way of circumnavigating around the legal boundaries presently intended to ensure that policy. To that end, determination of 'what is an event?' is likely to be crucial. An answer to that question was formulated by Chamberlain J in *Paul* at [63]-[75] and it was, ultimately, that approach which Master Cook followed in *Polmear*. Whether that analysis, and that answer, withstands scrutiny in the context of yet further policy deliberations remains to be seen.