Secondary Victims: Still Second-Class Claimants?

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In *King v Royal United Hospitals Bath NHS Foundation Trust* [2021] EWHC 1576 (QB), the High Court once again demonstrated the difficulties faced by Claimants who suffer psychiatric conditions as a result of witnessing loved ones (in this case, a new-born baby) die in hospital.

The Decision

Mr King is a LAMDA-trained actor who has appeared in *Mad Men* and *The Tudors*, amongst many others. He and his wife were expecting their second baby, a boy they named Benjamin. Benjamin was born late by emergency caesarean section on 5 May 2016, under the care of the Defendant Hospital Trust. Tragically, Benjamin died only five days later. The Defendant admitted negligence in its care for Benjamin and his mother, accepting that Benjamin would likely have survived if relevant care not been delayed and if he had accordingly been born before 5 May.

Mr King sought damages in his own capacity as a secondary victim. The medical evidence was agreed – he had suffered Post Traumatic Stress Disorder as a direct result of seeing his new-born son in NICU shortly after birth. In particular, he sought a substantial sum to reflect his alleged inability to move to Los Angeles and to obtain a part in Christopher Nolan's blockbuster, *Dunkirk*. Consequently, the claim was pleaded in "*a total approaching £10 million*" ([50]). Claims for bereavement damages and in respect of Benjamin's mother (as a primary victim) were settled before Mr King's case got to trial.

The relevant legal test is still that of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, as summarised thus by the Court of Appeal in *Liverpool Women's NHS Foundation Trust v Ronayne* [2015] PIQR P20:

1. the Claimant must have a close tie of love and affection with the person killed, injured or imperilled;
2. the Claimant must have been close to the incident in time and space;
3. the Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and
4. the Claimant's illness must have been induced by a sudden shocking event.

It was agreed that the first three conditions were met in this case. The fourth was disputed.

At [36] of his judgment, Philip Mott QC, sitting as a Deputy High Court Judge, cited the judgment of Tomlinson LJ in *Ronayne*:

> "*The reaction of most people of ordinary robustness to that sight, given the circumstances in which she had been taken into the A&E Department, and the knowledge that abnormalities had been found, including a shadow over the lung, necessitating immediate exploratory surgery, would surely be one of relief that the matter was in the hands of the medical professionals, with perhaps a grateful nod to the ready availability of modern medical equipment.*"

At [38], the Judge condensed the principle from *Alcock* and the subsequent decisions as follows:

> *"What is clear from the authorities is that "shock" in the Alcock sense requires something more than what might be described as "shocking" or "horrifying" in ordinary speech. It may be for that reason that the word "exceptional" has crept in, not as an addition to the test, but as an explanation that the shocking event must be outside ordinary human experience in the context in which it occurs."*

On the evidence before him, the Judge accepted at [29] that the Claimant was fully prepared for all the interventions and machinery he would see, and that this came before he entered the NICU. Once in the NICU, the Claimant saw Benjamin as "*a sleeping new born baby*" without any signs of distress save for the "*many tubes and wires*" connected to machines:

see [30].

As a result, the claim failed on liability, the Claimant being unable to establish his claim against the fourth of the *Alcock* criteria. However, the Judge went on to consider what damages he would have awarded had the claim succeeded, notably finding that a claim for lost earnings would have been merited but in a much lower amount than that claimed.

Comment

Years ago, shortly after the Court of Appeal decision in *Ronayne*, I gave a talk to solicitors on the difficulties faced by Claimants in bringing secondary victim claims arising out of negligent hospital treatment of a loved one. I remember pointing out that it was only a very rare category of case which would succeed. The High Court has repeatedly demonstrated this to be an accurate assessment. Tragically, *King* is but the most recent case.

Two further points are potentially of interest from the judgment. The first is that the evidence of the doctors was preferred to that of the Claimant on several important events, particularly concerning the chronology of the morning in question. That is so, notwithstanding that many of the notes were written following the events (as opposed to contemporaneously) and that some of the writers of the notes were not called upon to give evidence. This should not be read as lessening the importance of accurate note taking by medical professionals or of their attendance at Court to give evidence, but rather should be seen as an important lesson on witnesses needing to be consistent and logical in their evidence. The account which makes the most logical sense when set out chronologically usually has an inherently greater likelihood of being accepted as correct.

Secondly, criticism was made by the Judge of the expert who had provided evidence of the Claimant's lost earning potential. The Judge held, at [68], that the expert had strayed outside the realm of her expertise and had engaged in advocacy on the Claimant's behalf. This was apparently partially attributed to her having less experience of trial processes in England than in the USA. It is a timely reminder of the need for independence of experts and a demonstration of how they can be undermined.