Picking up the Pieces

Unintended tragedies and the scope of Secondary Victims

It is a fact of life that tragedies happen. When confronted by such events, the question that is often faced by personal injury practitioners is to what extent can a Defendant be liable for the far reaching and unpredictable consequences of an act of negligence? Legally, the scope of liability is recognised as not being restricted to the actual victim, but is capable of extension beyond the primary victim of an act of negligence. Establishing where to draw the cut-off point stands has been an issue that the Courts have wrestled with for decades however, especially in cases of psychiatric injury where the identification of injury is more complex.

Secondary victims

Secondary victims are persons who whilst not being personally in danger, suffer psychiatric injury through the perception of, or the hearing of the death or injury to another. This is safe to say, a huge pool of Claimants. On one hand as our understanding of psychiatric injury grows, so does our readiness as a society to accept the potential ease of its infliction. Conversely, the need for rigid control mechanisms to avoid mass and potentially unfettered "*flood gate*" litigation becomes ever more necessary. Whilst there is yet to be a case heard on the point, it seems only a matter of time till the impact of disturbing images recorded on mobile devices is considered by the Courts.

The current law on psychiatric injury developed following the Hillsborough Disaster in 1989 through the case of **Alcock v Chief Constable of South Yorkshire Police** [1991] UKHL 5. Due to reasons of public policy, the House of Lords introduced a number of control mechanisms that were designed to allow relatives who suffered injury as a result of seeing their close relatives being injured in the stadium to recover damages, whilst those who watched the

incident unfold on TV were not entitled to compensation. The House of Lords considered that to allow the recovery of damages, the relative must have "*close ties of love and affection*" with the primary victim. Furthermore, the Claimant must be "*close in time and proximity*" to the negligence or its immediate aftermath and the psychiatric injury must arise as a result of a "*sudden appreciation by sight or sound of a shocking event*."

There are few cases which advance to trial on such an issue and as such, the actual development of the law has been somewhat constrained through a lack of Court Judgments on this issue. For this reason, the case of **RE (A Minor) v Calderdale and Huddersfield NHS Foundation Trust** [2017] EWHC 824 (QB) is of specific importance.

The facts of RE (A Minor)

The case itself is tragic, and involved three members of the same family, RE a child being born, LE, the child's mother and DE the mothers grandmother who was present during the birth. The issue before the Court with regards to LE and DEs' claims was solely whether they were entitled to recover damages either as primary or secondary victims with causation of injury and quantum being agreed.

The case arose from complications during the birth of RE who suffered a hypoxic brain injury because of a negligent delay in her delivery. Goss J at paragraph 31 – 33 of the Judgment found that that RE started to sustain negligently caused damage when her head was crowned but her body remained in the birth canal. At this stage, the law would consider her to be "*in utero*" and therefore RE and LE were both considered to be the same legal being (as per **Wild v Southend University Hospital NHS Foundation Trust** [2014] EWHC 4053 (QB).

Since RE and LE were the same legal entity when injury was inflicted to RE, LE was classed as a primary victim of the Defendants negligence. This resulted in the LE being able to sidestep the draconian control measures imposed by **Mcloughlin v O'Brian** [1983] AC 410 and **Alcock.** Goss J was of the opinion that DE (who was present at the time of injury) had to be classed as a secondary victim. It was clear in evidence that she had witnessed a particularly

traumatic birth, and believed her newly born granddaughter to be dead. As per **Mcloughlin** and **Alcock**, Mr Justice Goss summarised the test for secondary victims articulately at paragraph 35 of the judgment as being effectively a two-stage process, namely;

"*The necessary preconditions to establish a claim as a secondary party are: -*

a. *a sufficient closeness both in terms of love and affection to the person injured or killed and being in sight or sound of the directly injurious event giving rise to the tortious liability;*
b. *the induction of psychiatric illness by shock, that is "the sudden appreciation by sight or sound of a horrifying event which violently agitated the mind*"."

The Defendant at trial didn't seek to dispute that both mother and grandmother had sufficiently close personal relationships in terms of love and affection with RE to give rise to a tortious liability in the event of RE suffering injury and accepted that both had witnessed the injurious event directly. It was also conceded that both were sufficiently close in terms of relationship to RE to be considered as secondary victims in any event. The sole remaining issue before the Court was whether the "*injurious event*" was sufficiently horrifying to establish a claim.

In reaching his decision, Goss J placed reliance on the considered the case of **Liverpool Women's Hospital NHS Foundation Trust v Ronayne** [2015] EWCA Civ 588 which previously had established that visitors to a hospital to a certain degree are "*conditioned as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter likely to prove distressing*" and therefore, in order to found a case in liability, the events would have to be "*something which is exceptional in nature*." (paragraphs 21 and 41 of the Judgment.) In **Ronayne** the Claimant had suffered psychiatric injury from the shock seeing of his seriously ill wife's appearance in hospital. She had undergone a hysterectomy and a few days after discharge she became unwell and was admitted to A&E. Shortly before she underwent emergency surgery for septicaemia Mr Ronayne saw his wife connected to various machines including drips and monitors. After surgery he saw her unconscious, connected to a ventilator, and being administered four types of antibiotic intravenously. He developed a psychiatric injury as a result of this. The Court of

Appeal, found that the event was neither sudden nor sufficiently shocking and that his psychiatric illness was not caused by that event.

In the case of **RE (A Minor)**, it was the viewing of the apparently dead and lifeless baby, coupled with the attempts to resuscitate that were found to fall outside of the standard events of childbirth, and therefore, couldn't be said to be "*part*" of the demands and experiences of child birth. On this basis, Goss J found that the both LE and DE satisfied the strict conditions required to be compensated as secondary victims.

Opening the floodgates?

Many mothers unfortunately experience births which have complications. For some these can be deeply traumatic experiences, leading to psychiatric injury. Whilst the findings in **RE (A Minor)** may be seen of limited application (as such cases would require a horrifying event such as the death or near death of the baby), the finding that RE's mother was a primary victim appears to open the door to further claims. It seems now to be clear that where a Defendant is negligent whilst a baby is still "*in utero*" and personal injury (either to the child or mother) was a foreseeable consequence, then the mother will be capable of recovering compensation for any subsequent psychiatric injury.

However, the case goes further and reflects on the realities of such events, and the involvement and proximity of family members to them. In dealing with the case of DE the evidence before the Court placed the grandmother square in the middle of the unfolding events. She was present throughout the birth and witnessed the aftermath and had believe that RE was dead. The control mechanisms in the opinion of Goss J were satisfied and the only matter to be determined was whether or not the event was sufficiently traumatic to be considered as sufficiently and objectively horrifying to establish a claim, which it was.

Goss J in his detailed but sensitive Judgement on this specific issue held that this was not a situation whereby the events LE and DE were exposed to manifested gradually over time, but rapidly materialised. As such, it couldn't be said that there was "*a process of gradual*

realisation [and]… no conditioning for what came nor was there any warning of a materialising risk". Reflecting on this decision, it is straightforward to consider how a significant body of potential Claimants may now have robust claims against health care providers.

Widening the pool of Claimants?

Sadly, every year a significant number of mothers during the process of giving birth will experience difficulties. Whilst these range in severity, for some they can be deeply traumatic experiences leading to psychiatric injury and periods of ill health. The decision of **RE (A Minor)** should be welcomed by both Claimants and Defendants since whilst being reflective of a harrowing and unfortunate birth, these types of events sadly are not unique. What we now have is some clarity. The decision of Goss J that the LE was a primary victim inevitably increases the potential for Claimants to bring claims but also provides clarity on a legal issue, restricting the issues that will require exploration at any future trials. Following **RE (A Minor)**, where there is an act of negligence resulting in harm to her child "*in utreo*" a claim of personal injury for nervous shock should be at least considered by practitioners.

As we approach a general election where the NHS and its viability will be intensely debated we should remember that the NHS has been instructed to find over £20 billion in efficiency savings by 2021. This is a colossal sum for an organisation whose outgoings will only ever increase with inflation and a growing and ageing population. There is proven correlation between cuts to budgets and acts of negligence through omissions. There must be a real concern that due to budgetary constraints, the facts giving rise to of **RE (A Minor)** will reoccur, and that the case may well be first of many claims of this nature. The decision however indicates that the Courts will be sympathetic to compensating all appropriate victims of negligence, and not be swayed by the politics of the issue.

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