# Secondary victim claims: what constitutes an 'event' in a clinical negligence action?

*Paul & Paul v The Royal Wolverhampton NHS Trust* [2020] EWHC 1415 (QB) is the latest contest to be fought on the battleground of secondary victim claims, an area of law notorious for its complex distinctions and arbitrary legal hurdles.

The case is particularly interesting for its application of the relevant legal principles to the clinical negligence context and, in particular, to the issue of whether it is fatal to a secondary victim claim if there is a delay between an initial tort (arising for example from a failure to diagnose or a failure to treat a patient) and a claimant's subsequent experience of shock.

**Background**

In *Paul*, the Defendant had applied to strike out the secondary victim claim on the basis that it disclosed no reasonable grounds to be brought or, alternatively, by way of summary judgment as having no real prospect of success. The Defendant's application had been successful before Master Cook, whose judgment was then appealed by the Claimants. The appeal was heard by Mr Justice Chamberlain.

The pleaded facts of the claim related to a heart attack suffered by a father (the primary victim), which was witnessed by his two children (the secondary victims). The Defendant was alleged to have been negligent in failing to diagnose the father's coronary artery disease some 14 months earlier, which (if diagnosed) would have been successfully treated by coronary revascularisation and would have avoided the father's subsequent heart attack and death.

The key issue was whether the delay of 14 months precluded the claim. The parties were in agreement that there was no requirement in law for a relevant shocking 'event' to be temporally proximate to a breach of duty itself. The issue was whether the delay meant that the claim could not succeed due to a lack of proximity between the Claimants' experience of shock (at the time of their father's heart attack) and any earlier negligently caused injury.

The central case relied upon by the Defendant was *Taylor v A. Novo UK Ltd* [2014] QB 150, in which the Court of Appeal held that a secondary victim claim could not succeed in which the claimant had witnessed her mother's collapse and death three weeks after her mother had sustained a head injury as a result of a fellow employee's negligent stacking of racking boards. The Court of Appeal held that the collapse and death were merely the later consequence of the original accident and could not constitute the relevant 'event' for the purposes of a successful secondary victim claim.

A further case that was central to the Defendant's argument was *Taylor v Somerset Health Authority* [1993] PIQR 262, in which Auld J had dismissed a secondary victim claim in which the claimant's husband had suffered a heart attack which had been caused by the defendant's failure many months before to diagnose and treat his heart disease. In dismissing the claim, Auld J had held that, on the facts, there was not *"an external, traumatic, event caused by the defendant's breach of duty which immediately causes some person injury or death"* but

instead *"the final consequence of Mr Taylor's progressively deteriorating heart condition which the health authority, by its negligence many months before, had failed to arrest."*

The key case relied upon by the Claimants was *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, in which the Court of Appeal had allowed a claim in which the defendant had failed to diagnose that a baby was suffering from acute hepatitis (which, if diagnosed, would have resulted in a liver transplant) some six weeks before the baby was witnessed by her mother having a fit. The baby died 36 hours later in his mother's arms. The course of the 36 hours was considered to be one single *"horrifying event"* with an *"inexorable progression"* from the moment the fit occurred until the climax of the baby's death.

**Judgment**

In a detailed and thoughtful judgment (which also considered various cases beyond those cited above), Chamberlain J allowed the appeal on two grounds.

The primary ground was that, on the pleaded facts of the claim, the primary victim first suffered an injury at the time of his heart attack. Given that, for the purposes of the strike-out application, Chamberlain J had to adopt the factual position most favourable to the Claimants, the claim should proceed.

The second (and considerably more interesting) issue was whether the appeal would be allowed even if the Defendant was right that the primary victim will have suffered some injury at or about the time of the breach of duty. In other words, for the Claimants' experience of shock to be the relevant 'event', was it necessary for it to be temporally proximate with when the tort was completed (i.e. when damage was first suffered)? Chamberlain J dismissed the Defendant's argument on this point. Approaching the issue by way of an analysis of what counts as an 'event', he considered that, if one had to identify a point in time beyond which the consequences of a negligent action could no longer qualify as an 'event', the obvious candidate was when the damage first becomes "manifest" to the secondary victim or (using the language of *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB)) "evident" to the secondary victim. Depending on the facts, this was not necessarily the same point in time as when injury was first suffered. This analysis accorded with *Walters*, where the baby's fit was the start of the relevant event and not any earlier injury suffered by the failure to diagnose six weeks previously. *Taylor v A. Novo* was distinguished on the basis that, in that case, damage became manifest when the original accident occurred (three weeks before the collapse/death witnessed by the claimant).

**Ramifications**

*Paul* needs to be viewed in context as an appeal relating to a strike-out application and it remains to be seen whether Courts in the future will apply similar reasoning. The case, is, however, important in considering a point of law which is particularly relevant to clinical negligence actions, which frequently involve a gap between breach of duty and damage, or at least between breach of duty and discovery of that damage. In this regard, clinical negligence cases can involve different considerations from the 'accident' claims that form much of the case law in this field. While some may have felt that the law on secondary victim

claims had reasonably settled in recent years, *Paul* demonstrates that certain issues still remain live and the case is likely, subject to any developments on further appeal or at trial, to result in increased litigation in this knotty area of law.

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